Department of Law

Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union

Jorrit J. Rijpma

Thesis submitted for assessment with a view to obtaining the degree of
Doctor of Laws of the European University Institute

Florence, October 2009

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Examining Board:

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This thesis was submitted for language correction

« [....]l'érection d'un mur coupant l'île en deux dans sa partie la plus étroite servit à protéger les régions fertiles et policées du sud contre les attaques des tribus du nord. […] Mais déjà cet ouvrage purement militaire favorisait la paix, développait la prospérité de cette partie de la Bretagne; des villages se créaient; un mouvement d'afflux se produisait vers nos frontières»

Marguerite Yourcenar, Mémoires d'Hadrien (1951), 202

While Member States remain responsible for controlling their own border, the Union's common policy in support of Member States' efforts should be continuously developed and strengthened in response to new threats, shifts in migratory pressure and any shortcomings identified, […] People-to-people contacts in border regions and between family members should be facilitated. Border management should support, not stifle, economic growth in border regions of neighbouring countries.

European Commission, Preparing the next steps in border management in the European Union (2008), 2-3

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Acknowledgements

After four years spent up in the hills of Fiesole it is now time to say goodbye to the European University Institute and Florence. A few words of thanks are in order.

The writing of this thesis would have been a lonely exercise had it not been for the excellent and reassuring supervision of Professor Marise Cremona. It has been a true privilege to have such a knowledgeable and kind person accompanying me during my stay at the EUI. Professor Bruno de Witte has from the beginning provided me with valuable comments when acting as a second reader. This thesis would probably not have been written had I not met Professor Ellen Vos as an undergraduate student at the University of Maastricht. She has been of guidance in many different ways ever since. I owe much to Professor Virginie Guiraudon and Ferruccio Pastore for the confidence placed in me and for helping me situate the topic of this thesis in its political and social context. Many thanks also to Sakari Vuorensola and Sabine Kloss-Tullius for their insights and help during and after my internship at the Frontex Headquarters in Warsaw. Nadine El-Enany has done a terrific job revising the language of this thesis.

In the past years I have had the luck of meeting some very special people. Some of them deserve to be mentioned by name for their friendship, love, support, good advice or simply having been there when needed.

Claudio and Leonardo Corsi, my Florentine family, Ioana and Bernhard Knoll-Tudor, Fabian and Tijana Breuer-Prokić, Matteo Senesi, Andrea Coppola, Alessandro Modestino Ricciardelli, Vasiliki Kosta, Alli Dunne, Floris de Witte, Fernando Veliz, Giovanni Amodeo and Rosario Balistreri, Antonio Marcacci, Saverio Mancuso, Alun Gibbs, Maciej Kiela and Philip Schäfer, Baptiste Demay, Thomas Gammeltoft-Hanssen.

A special thank you goes to my Dutch friends, who have always remained close to me and who continue to be my point of reference. Thanks also to my friends from the College, for always making me a home wherever in Europe I find myself.

This thesis is dedicated to my family. Their contribution goes far beyond the continuous love, support and encouragement they have given me. I am deeply indebted to my parents, Menno and Ineke Rijpma, who have made sure that my life has had tail wind from the very start, my brothers Jesper and Roderik and my grandmother.

Abbreviations

1. Abbreviations in text

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
CARDS	Community Assistance for Reconstruction, Development and Stabilisation
CATS	Comité Article Trente-Six
CBC	Cross Border Cooperation
ENPI	European Neighbourhood Instrument
ENP AP	European Neighbourhood Action Plan
CAT	Convention against torture and other cruel inhuman or degrading treatment or punishment
COSI	Comité permanent de la Sécurité Intérieure
IPA	Instrument for Pre-Accession Aid
FPA	Framework Partnership Agreement
IDC	Instrument for Development Cooperation
CELAD	Comité Européen de la Lutte Anti-Drogue
CISA	Schengen Implementation Convention
COREPER	Comité des représentants permanents
EBF	External Borders Fund
EC	Treaty establishing the European Community
ECSC	European Coal and Steal Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EDPS	European Data Protection Officer
EEA	European Economic Area
EFTA	European Free Trade Association
EPC	European Political Cooperation
EPN	European Patrols Network
EU	Treaty on European Union

GAM	Groupe d'Assistance Mutelle
GATS	General Agreement on Services and Trade
ICJ	International Court of Justice
ILO	Immigration Liaison Officer
ICCPR	International Covenant of Civil and Political Rights
IMO	International Maritime Organisation
JHA	Justice and Home Affairs
JLS	Justice, Liberty and Security
SBA	Sovereign Base Area
SBC	Schengen Borders Code
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SRR	Search and Rescue Region
SAR	Search and Rescue Area
SAR Convention	Search and Rescue Convention
SOLAS Convention	Convention on Safety of Life at Sea
SEA	Single European Act
SIS	Schengen Information System
SIVE	System for the Vigilance of the Strait or Integrated System of Exterior Vigilance
TCN	Third Country National
TEC	Treaty establishing the European Community (before Amsterdam)
TEU	Treaty on European Union (*post* Lisbon)
TFEU	Treaty on the Functioning of the European Union
UNDP	United Nations Development Programme
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council

2. Abbreviations Journals

AD	Annual Digest of Public International Law
AJIL	American Journal of International Law
AJPS	American Journal of Political Science
ALR	Australian Law Reports
BOE	Boletín Oficial del Estado
BYIL	British Yearbook of International Law
Cam Rev Int'l Aff	Cambridge Review of International Affairs
Can YB Int'l L	Canadian Yearbook of International Law
Cardozo L Rev	Cardozo Law Review
CEP	Comparative European Politics
CMLRev	Common Market Law Review
Colum J Transnat'l L	Columbia Journal of Transnational Law
Colum L Rev	Columbia Law Review
Comp Pol Stud	Comparative Political Studies
ECR	European Court Reports
EFARev	European Foreign Affairs Review
EHRLRev	European Human Rights Review
EIoP	European Integration Online Papers
EJCL	European Journal of Comparative Law
EJIL	European Journal of International Law
EJIR	European Journal of International Relations
EJML	European Journal of Migration and Law
EJPR	European Journal of Political Research
ELJ	European Law Journal
ELRev	European Law Review
EuR	Europarecht
Geo LJ	Georgetown Law Journal
GU	Gazetta Ufficiale
IJRL	International Journal of Refugee Law
ILR	International Law Reports
IM	International Migration
Ind J of Global Legal Stud	Indiana Journal of Global Legal Studies

IPS	International Political Sociology
ISP	International Studies Perspectives
J Int'l L & Pol'y	University of Pennsylvania Journal of International Law & Policy
JCMS	Journal of Common Market Studies
JCP	Journal of Consumer Policy
JEI	Journal of European Integration
JEMS	Journal of Ethnic and Migration Studies
JEPP	Journal of European Public Policy
JLEO	Journal of Law, Economics, and Organization
JORF	Journal Officiel de la République Française
JPP	The Journal of Political Philosophy
JTLP	Pittsburgh Journal of Technology Law and Policy
King's College LJ	King's College Law Journal
LNTS	League of Nations Treaties Series
Max Planck YUNL	Max Planck Yearbook of United Nations Law
Med Pol	Mediterranean Politics
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
New Pol Econ	New Political Economy
OJ	Official Journal of the EC/EU
OJLS	Oxford Journal of Legal Studies
PEPS	Perspectives on European Politics and Society
Pol Stud	Political Studies
PPA	Public Policy and Administration
RDI	Rivisita di Diritto Internazionale
Rev of Pol	The Review of Politics
RIAA	UN Reports of International Arbitral Awards
Soc & Leg Stud	Social and Legal Studies
SR	Systematische Sammlung des Bundesrechts
Trb	Tractatenblad
UNTS	United Nations Treaties Series
Virginia J Int'l L	Virginia Journal of International Law
VUWLR	Victoria University of Wellington Law Review

WEP	West European Politics

3. Abbreviations in footnotes

APSA	American Political Science Association
CARIM	Consortium for Applied Research on International Migration
CEPS	Centre for European Policy Studies
CeSPI	Centro Studi di Politica Internazionale
CSB	Central Statistics Bureau
CUP	Cambridge University Press
ECPR	European Consortium for Political Research
EIPA	European Institute of Public Administration
EPIN	European Policy Institutes Network
EUI	European University Institute
GAO	Government Accountability Office
GCIM	Global Commission on International Migration
GIHR	German Institute for Human Rights
HL	House of Lords
IBRD	International Bank for Reconstruction and Development
IOM	International Organisation for Migration European
ECRE	European Council on Refugees and Exiles
ICMPD	International Centre for Migration Policy Development
ILGA	International Gay and Lesbian Association
ILO	International Labour Organisation
MPI	Migration Policy Institute
NATO	North Atlantic Treaty Organisation
NBER	National Bureau of Economic Research
OECD	Organisation for Economic Cooperation and Development
OSCE	Organisation for Security and Cooperation in Europe
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice

PSE	Party of European Socialists
RSC	Refugees Studies Centre
RSCAS	Robert Schuman Centre for Advanced Studies
SGIR	ECPR Standing Group on International Relations
UdC	Unione dei Democratici Cristiani e di Centro
UMP	l'Union pour un Mouvement Populaire
UNODC	United Nations Office on Drugs and Crime

Abstract

This thesis, starting from the premise that territorial borders retain their importance in public international law, examines in detail the EU's regulatory framework for the management of its external borders. It will argue that there are in fact two sets of external borders: those of the area in which the rules on the free movement of persons apply, and those of the Schengen area. The border crossing rights under the two corresponding sets of rules will be examined in detail.

The focus will then shift to the broader Schengen rules for the management of the external borders. The thesis will discuss the rationale of the EU's interest in borders, the legislative *acquis* adopted, and the relation between legislation and executive action. An elaborate discussion on the organisation and functioning of the "European Border Agency" (Frontex) serves to illustrate the importance of operational cooperation in this area. A final chapter will look at the external dimension of this policy field. A distinction is made between the relations with third countries for the purpose of managing the external borders and the exportation of Community standards. Also in the external sphere, the objective of controlling irregular migration and the operational nature of EU action are prominent.

It is concluded that the management of the external borders takes place in a much more complex and uncertain legal framework than is often assumed. Whilst border management should be a part of or rather complement a Common European Asylum and Migration policy, it now risks becoming a substitute for it. Even where legislation is adopted, it has a strong operational character, which carries risks in terms of accountability and legitimacy. The legislation in this area is both far-reaching and ill-thought through at the same time.

I. Introduction

Since the Laeken European Council Conclusions of 14 and 15 December 2001 called upon the Council and the Commission to start work on arrangements for the cooperation between Member State border guard authorities, developments in this policy area have been fast and far-reaching.[1] The present thesis examines the regulatory framework for the management of the external borders of the European Union that is progressively being put in place. This apparently simple statement raises a number of questions.

First of all it is necessary to establish what is meant by "regulatory framework." Borders are at the crossroads of national and international law. With the entry into force of the Treaty of Amsterdam, granting the European Union important competences for the regulation of the external borders, a third set of rules needs to be taken into account, namely Community law. However, the notion of regulatory framework embodies more than just the legal regime that applies at the external borders. It also refers to the implementation thereof, both in law and practice, that is to say the way in which the powers of management of the external borders are being exercised and by whom.

Second, the notion of border management requires definition. It shall be understood as the processes and procedures associated with border checks which take place at authorized crossing points, including airports, and border surveillance, which is carried out on the so-called green (land) borders between authorized crossing points as well as along the blue (sea) borders.[2] While this definition closely resembles the definition of border management given in the 2002 Commission Communication on the integrated management of the external borders, the concept of integrated boarder management, as recently defined by the Council, is much broader, including a four-tier system of access control of which border control (checks and surveillance) are but an element.[3]

Finally, it should be questioned what is to be understood precisely by the notion of the "external borders of the European Union." It has been argued that Europe is increasingly difficult

[1] European Council Conclusions, Laeken, 14 and 15 December 2001, point 42.
[2] This definition is largely the same as given by Hills, though she does not include sea borders: Hills, A., 'The rationalities of European Border Security', 15 *European Border Security* 1 (1996), 69.
[3] COM(2002) 233 final, Commission Communication 'Towards Integrated Management of the External Borders of the Member States of the European Union', 26; Council Conclusions on Integrated Border Management, Brussels, 4-5 December 2006 (Council Document 15801/06).

to define, even in strict legal terms.[4] The variable geometry of European integration as well as the absence of a *finalité geographique* of the European project seem to support this argument. The reference in plural first of all gives expression to the fact that the European Union consists of sovereign states to whom the power to regulate entry into their respective territories remains a core principle of their sovereignty. Yet it also indicates that the there may be different sets of "external borders" to be found in different places.

A broad consensus can be found amongst social scientists that borders are "not simple lines on a map deciding where one jurisdiction or political authority begins and the other ends".[5] Much attention has been paid to the metaphorical or symbolic meaning of the border.[6] Lapid has proposed an entire research agenda labelled "border, identities and orders", arguing that the three are connected in a triangle in which each element has a determining value for the others.[7]

Numerous academics have emphasised the diminishing value, both relative and real, of borders as a regulatory tool in a globalising world. Border functions have increasingly become disconnected from the territorial frontiers, shifting to sites within as well as beyond the territory of the Member States.[8] This thesis nevertheless focuses on the management of territorial borders. This approach risks criticism for being too positivistic or too narrow. However, this thesis does not argue that the more metaphysical dimensions of borders should be ignored. Nor should the importance of border controls away from the geographical border be left unnoticed. What it does argue is that territorial borders and their regulation remain important subjects of study, especially in the context of the European Union. This is not merely because the international state system remains the foundation upon which modern public international law is constructed, but also because the borders that delimit those states continue to form physical obstacles between those "in" and "out" a given territorial jurisdiction. A classic discourse on sovereignty and territoriality

[4] Cowley, J., 'Locating Europe', in: Groenendijk, K.. *et al*. (Eds), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 36.
[5] Anderson, M., *Frontiers: Territory and State formation in the Modern World* (Cambridge, Polity Press, 1996), 1.
[6] Cassarino, J.-P., Approaching Borders and Frontiers: Notions and Implications (Florence, EUI RSCAS Research Report 3, 2006), 5.
[7] Lapid, Y., 'Identities, Borders, Orders: Nudging International Relations Theory in a New Direction', in: Albert, M., Jacobsen, D. and Lapid, Y. (Eds), *Identities, borders, orders: rethinking international relations theory* (Minneapolis, University of Minnesota Press, 2001), 1-20.
[8] Zureik, E. and Salter, M., 'Introduction', in: Zureik, E. and Salter, M. (Eds), *Global Surveillance and Policing - Borders, security, identity* (Portland, Willan Publishing 2005), 4.

continues to inform the thinking on borders and by consequence the way in which access control is regulated.

Border institutions have always had the dual objective of defence and discipline.[9] While the defence function of borders has lost much of its relevance after the Cold War, borders still serve as sites of law enforcement, in particular of migration rules. This holds true today, even if other sites and forms of monitoring the movement of people complement controls at the territorial borders. With the lifting of checks at the internal borders of the EU Member States that form part of the borderless Schengen area, the logic of controls at the internal borders has been largely transposed to the external borders.

The reality at the EU's external borders shows that although visa requirements and carriers sanctions may have closed off official air routes and ferry connections, this has not stopped people from attempting to reach Europe irregularly. A 2007 Report on illegal migration in Central and Eastern Europe found that since 2004 there had been an increase in the use of official road border posts for illegal crossings, although in many countries the most common way of crossing the border irregularly remained on feet, outside designated crossing points.[10] According to a 2004 report of the ICMPD an estimated 100,000 to 120,000 undocumented migrants try to cross the Mediterranean each year.[11] Not only can official numbers provide a mere estimate of the actual size of these flows, they also fail to express the cost of human life and suffering of such journeys.

This thesis looks at the regulation of the EU's external borders from two angles. The first is that of EU substantive law: the legal regime that governs the crossing of the EU's external borders by individuals. What are the rights and obligations of different categories of people who wish to enter or exit the European Union's territory? The second looks at the external borders from an institutional point of view. It seeks to establish the relation between the Union and its Member States in this policy area and the role of the different EU Institutions. Phrased in legal terms, the question is one of competences and the division thereof between the various actors within the

[9] Geouffre de Lapradelle, P., *La Frontière* (Paris, Les Editions Internationales, 1928), 14.
[10] Futo, P. and Jandl, M. (Eds), 2006 Year Book on Illegal Migration, Human Smuggling and Trafficking in Central and Eastern Europe - A Survey and Analysis of Border Management and Border Apprehension Data from 20 States (ICMPD, Vienna, 2007), 20-21.
[11] ICMPD, 'Irregular transit migration in the Mediterranean: some facts, futures and insights' (Vienna, 2004), 8.

European constitutional order, not merely in relation to each other, but also in relation to neighbouring third countries.

The power over borders is, like most policy fields in the area of Justice and Home Affairs (JHA), intimately linked to a core understanding of sovereignty. Not only do Member States wish to retain the power to decide who enters their territory, the guarding of the EU's external borders may also involve the use of force. The study of the "objective component" of borders is therefore likely to provide an insight into the broader development of the European polity, not merely internally, but also vis-à-vis third countries.[12]

The EU's policy for the management of the external borders may also provide an insight into other fields covered by the Union's objective of creating an Area of Freedom, Security and Justice (AFSJ). Measures for the management of the external borders are now firmly based in Title IV EC of the First Pillar of the EU. Being intimately linked to the EU's immigration and asylum policy the study of the external borders may be able to tell us more about the development of Union's policy in this area.

It should furthermore be recalled that - despite being united under the common AFSJ objective - policies in Justice and Home Affairs (JHA) remain divided over Title IV EC and Title VI EU on police and judicial cooperation in criminal matters. Border management is currently the only police power that is communitarised, forming an example of how competences under the Third Pillar "branch out."[13] Since the use of force could potentially infringe fundamental rights and freedoms, the development of any policy in relation to the exercise of police powers needs to be both legitimate and accountable. The management of the external borders of the EU may serve as a laboratory for future cooperation in the AFSJ, especially in view of the merging of the First and Third Pillar foreseen by the Treaty of Lisbon.

Chapter II-VI serve to give the reader the necessary background against which the more in-depth study of the management of the external borders in the final chapters must be understood. Article II will discuss the relevant rules of public international law on borders, and discuss the continuing relevance of the concept of sovereignty and territoriality. Chapter III will discuss the extent to which the powers to regulate the external borders have been carried over from the Member State

[12] Cohen, A., *The Symbolic Construction of Community* (London, Routledge, 1989), 12.
[13] Fijnaut, C., 'Police Co-operation and the Area of Freedom, Security and Justice', in: Walker, N. (Ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), 266.

to the EU level and the way in which this has been done. Chapter IV will show that the location of the external borders is not only determined by the extent to which these powers have been transferred, but also by the non-participation of certain Member States in the rules applicable to the borders of the Schengen area and the association of certain third countries with these rules. Chapter V will discuss in detail the border crossing right that are based on the Community rules on free movement. Chapter VI will discuss the regime governing the crossing of the external borders of the Schengen area.

Chapter VII is in a sense an introduction to the broader questions of EU border management through its revisiting the logic for the EU's involvement in this policy area. Up until that point, the common rules for the crossing of the external borders that were discussed in Chapters V and VI could still find their justification by reference to the EU's internal market rationale of the free movement of persons. However, the external borders have increasingly become the place where the EU asserts a role for itself in the provision of internal security. The abundant activity of the EU in this policy field, the restrictive nature of its activities and the amount of resources directed at the prevention of the irregular crossing of the external borders beg further scrutiny.

Chapter VIII will discuss in detail the legislative measures that have been adopted for the management of the external borders. This chapter will however show that much of the activity for the management of the external borders is actually non-legislative in nature and consists of the coordination of Member States' border guard authorities. In addition, some of the most important pieces of legislation that have been adopted in this area provide already existing practical cooperation arrangements between the Member States with a legal basis and framework. However, the suitability of integration through operational cooperation rather than through substantive legislation needs to be questioned. It seems not only to deliberately frame political questions as non-political, but also prevents democratic and judicial scrutiny.

A good example of legislation that codifies previously existing, rather informal cooperation arrangements, is that of the European Border Agency, Frontex. This agency will be the subject of Chapter IX. It will look at Frontex's position in the EU's institutional architecture, its organisational build-up, tasks and activities. Also Frontex is presented as an a-political, technical body. The Chapter takes issue with that. Particular attention will be paid to the accountability of its activities. Chapter X will look at the external dimension of EU border

management. It will show how the logic for the management of the external borders which was described in Chapter VII is reflected in the external dimension thereof. The external dimension does not only consist of cooperation with third countries for the management of common borders, but also the promotion of the EU's standard abroad and the shifting of the surveillance of the Member States' borders outside Member States' territories. Joint operations at sea, outside the Member State's territorial waters, once more lead to important questions of accountability. It will confirm a more central theme in this second part of this thesis, that is the difficulty of joint law enforcement activities, both in practical terms and in terms of legitimacy and accountability in the absence of a common legal framework for such activities.

II. Borders: Delimiting Sovereignty

1. Introduction

In order to examine the legal regime at the EU's external borders it is necessary, as a preliminary step, to examine the concept of a border and its legal significance. Borders as institutions are a construct of international law. In contrast to a vast literature on the border as a multi-faceted concept in political geography, political science, anthropology and sociology,[1] the concept of a border in international law is largely confined to its territorial or geographical meaning as an imaginary line on the surface of the earth separating the territory of one state from that of another.[2]

The argument is frequently put forward that the border as a "unified, univocal concept" is a myth.[3] Indeed, it is hard to sustain that a state's border has the same function and effect for individuals belonging to different groups, nor that the border is *experienced* at the same location.[4] This does however not mean that states' territorial borders, as understood in public international law, have shifted, nor that they should be considered redundant as a site at which a state exercises its sovereign powers.

The aim of this chapter is first of all to set out the most important rules of public international law relating to the definition of borders. This will allow us at a later stage to define the meaning of European external borders. Secondly, it will show that in spite of globalisation, borders maintain their importance in the organization of the public international legal order. The explanation for this is not merely to be found in the fact that the states they delimit continue to form the basis of public international law.[5] The explanation must also be sought in the continuing relevance of the concept of sovereignty and in particular one of its key characteristics: territoriality.

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[1] See for an overview: Cassarino, J.-P, 'Approaching Borders and Frontiers (Florence, EUI RSCAS, CARIM Research Report, 2006/03).
[2] Jennings, R. and Watts, A. (Eds), *Oppenheim's International Law* (Harlow, Longman, 1992), 661.
[3] Kesby, A., 'The multiple and shifting border and international law', 27 *OJLS* 1 (2007), 113.
[4] *Ibid*.
[5] Brownlie, I., 'Rebirth of Statehood', in: Evans, M. (Ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe'* (Aldershot, Dartmouth, 1997), 5.

This chapter will conclude with a discussion of the rules of public international law which confer rights on individuals to cross a sovereign state's border. An examination of these rules and the relevant case law is necessary for two reasons. First, they condition lawmaking on and the actual management of the EU's external borders. Secondly, they show how territorial thinking continues to inform migration and refugee law. As a result, the physical border remains the first and only place at which border crossing rights may be asserted.

2. Defining Borders in International Law

Borders form the necessary delimiting element of territory, which together with people and authority is one the three essentials of statehood.[6] Article 2 of the Draft Declaration on the Rights and Duties of States reads:

> "Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law."[7]

The territory of a state includes the airspace above the land, as well as the earth beneath it.[8] It further includes a 12 mile territorial sea.[9] As such, the territory in which a state exercises sovereignty is a volume rather than a surface.[10] In addition to the territorial sea, countries may claim an additional 12 mile contiguous zone in which they may assert jurisdiction - yet in which they are not sovereign - to "prevent infringement of its customs, fiscal, immigration or sanitary

[6] Müller-Graf, P.-C., 'Whose Responsibility are frontiers?', in: Anderson, M. and Bort, E. (Eds), *The Frontiers of Europe* (London, Pinter, 1998), 15. Often a fourth element, the capacity to enter into relations with other states, is mentioned. See e.g. Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, 165 *LNTS* 19 (1934).

[7] International Law Commission, Draft Declaration on the Rights and Duties of States, attached to GA Resolution 375 (IV) of 6 December 1949.

[8] According to the Roman adage: *Cuis est solum, eius est usque ad caelum ad inferos* ("for whomsoever owns the soil, it is theirs up to the sky and down to the depths"). For the airspace this was laid down in the 1919 Paris Convention Relating to the Regulation of Aerial Navigation, 11 *LNTS* 173 (1922). Although there is no consensus on a legal boundary between airspace and outer space, there is an implied principle that a state's sovereignty does not extend indefinitely into space: Boczek, B., 'International Law: A Dictionary (Lanham, Scarecrow Press, 2005), 239.

[9] Articles 3 and 33, UN Convention on the Law of the Sea (hereinafter: UNCLOS).

[10] Caflisch, L., 'A Typology of Borders' (Presentation at the International Symposium on Land and River Boundary Demarcation and Maintenance in Support of Borderland Development, Bangkok, 7-9 November 2006), 3.

laws and regulations."[11] They may further assert jurisdiction over the exploitation and exploration of living and non-living marine resources in an area of 200 miles from the coast, the so-called Exclusive Economic Zone.[12] Finally, states have the right to harvest mineral and non-living material in the sub-soil of their continental shelf to the exclusion of others.[13]

A distinction is made between boundaries, which are the lines dividing land territory over which States exercise full jurisdiction, and limits, which are the lines dividing spaces in which states do not exercise full territorial jurisdiction, such as those separating maritime spaces.[14] This different terminology does justice to the fact that maritime spaces are attributed according to rules different from acquisition of territory and that these are not subject to a state's full sovereignty.[15] Provisional dividing lines, such as in areas of *de facto* authority, are called demarcation lines.

With regard to governmental processes, there are four main stages in the history of a boundary: allocation, delimitation, demarcation and administration.[16] Allocation refers to the initial political division of territory between states.[17] The delimitation of a boundary consists of its definition, whereas the demarcation of a boundary, which presupposes its prior delimitation, consists of operations marking it out on the ground.[18] Public international law does not require the boundaries of a state to be fully delimited, nor does it require demarcation. A German-Polish Mixed Arbitral Tribunal stated in 1929:

> "In order to say that a State exists (…) it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory."[19]

[11] Articles 3 and 33, UNCLOS.
[12] Articles 55-57, UNCLOS.
[13] Article 76, UNCLOS. A state's continental shelf may exceed 200 nautical miles until the natural prolongation ends, but it may never exceed 350 nautical miles, and 100 nautical miles beyond 2,500 meter isobath.
[14] Caflisch, L., *supra* note 10, 1-2.
[15] *Ibid.*, 2. Caflish argues that this holds true even for the territorial sea which is subject to a right of innocent passage for foreign ships (Article 52, UNLCOS).
[16] Jones, S., *Boundary Making: A Handbook for Statesmen, Treaty Editors and Boundary Commission* (New York, Johnson Reprint Corporation, 1971), 5. See also: Geouffre de Lapradelle, P., *La Frontière* (Paris, Les Editions Internationales, 1928), 15-16 and Prescott, J., *Boundaries and Frontiers* (London, Croom Helm, 1978), 31.
[17] Prescott, J., *ibid*.
[18] *Territorial Dispute* (Libya/Chad) judgment, *ICJ Reports* (1994), 6, para. 56.
[19] *Deutsche Continental Gas-Gesellschaft v Poland* (1929), 5 *AD* 11 (1929-30), 15, reproduced in Crawford, J., 'The Criteria for Statehood in International Law', 48 *BYIL* (1976-77), 113.

As the International Court of Justice (ICJ) in *North Sea Continental Shelf* held:

> "There is (…) no rule that the land frontiers of a State must be fully delimited and defined, and often in various places they are not."[20]

What matters is that a state consistently controls a sufficiently identifiable core of territory.[21] Nonetheless, considerable value is attributed to clearly defined boundaries, especially in the interpretation of boundary treaties. The Permanent Court of Arbitration in its Advisory Opinion of 21 November 1925 held that:

> "(…) any article designed to fix a frontier should, if possible be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive border."[22]

The definitive nature of borders is highly valued in international law as follows from the ICJ's judgment in the *Preah Vihear* case:

> "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors will remain to be discovered."[23]

The fact that the *clausula rebus sic stantibus* (fundamental change of circumstances) may not be invoked as a ground for suspension or termination of a boundary treaty according to Article 62(2)(a) of the 1969 Vienna Convention on the Law of Treaties underscores the importance of

[20] *North Sea Continental Shelf* (Germany/Netherlands), *ICJ Reports* (1969), 3, para. 46.
[21] Malanczuk, P., *Akehurst's Modern Introduction to International Law* (London, Routledge, 1997), 76.
[22] Interpretation of Article 3, para. 2 of the Treaty of Lausanne, Advisory Opinion, 1925, *PCIJ*, Series B, No. 12, 20 and recalled in: *Territorial Dispute* (Libya/Chad), *supra* note 18, para. 47. See also Lapradelle, who considered delimitation to be a "principe fondamental du droit international moderne", *supra* note 16, 72.
[23] *Temple of Preah Vihear* (Cambodia/Thailand), *ICJ Reports* (1962), 17, para. 34.

stable and final borders. So does the preeminence of the principle of *uti possidetis juris*. This principle was developed in the course of the decolonization of Latin America and subsequently applied to the same process on the African continent. It is essentially a "retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes".[24] It is aimed at "securing respect for the territorial boundaries at the moment when independence is achieved".[25] The ICJ held that the principle was "not a rule pertaining to one specific system of international law," but a principle of general scope.[26]

Outside the context of decolonization, it was applied by the Badinter Commission in relation to the conflict in Yugoslavia, providing the basis for the international community's recognition of the seceding republics as states with borders corresponding to the former internal boundaries of the Yugoslav federation.[27] In this regard, it should be noted that also the Guidelines adopted by the EC Member States on 16 December 1991 on the recognition of new states in Eastern Europe and in the Soviet Union required the "respect for the inviolability of all frontiers which could only be changed by peaceful means and by common agreement".[28]

Political geographers often distinguish between boundaries and frontiers.[29] The term frontier has the connotation of borderland, of an area of transition within which the boundary lies.[30] It is in this sense that Lapradelle uses the term *voisinage* when he argues that a borderland reemerges after delimitation in the guise of an organized regime, subject to both international and internal

[24] *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), *ICJ Reports* (1992), 351, para. 43
[25] *Frontier Dispute* (Burkina Faso/Mali), *ICJ Reports* (1986), 554, para. 23. See for a critique of this principle and the fact that is has been left unaffected by the rights of people to self-determination: Castellino, J. and Allen, S., *Title to Territory in International Law: A Temporal Analysis* (Aldershot, Ashgate, 2003).
[26] *Frontier Dispute* (Burkina Faso/Mali), *ibid*.
[27] Arbitration Commission, set up in September 1991 in the context of the Conference on Peace in Yugoslavia, composed of five judges who were president of the constitutional courts of EC Member States and presided over by Robert Badinter, then President of the French Conseil Constitutionnel. Adherence to the principle has been criticized by *inter alia* Castellino and Allen, *supra* note 25 and Radan, P., *The Break-Up of Yugoslavia and International Law* (New York, Routledge, 2002), chapter 7.
[28] These Guidelines were then referred to in the EPC Declaration on Yugoslavia of that same day. See: Rich, R., 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 *EJIL* 1 (1993).
[29] Sahlin, P., *Boundaries: The Making of France and Spain in the Pyrenees* (Berkeley, University of California Press, 1989), 4.
[30] Prescott, J., *supra* note 16, 31.

law.[31] O'Dowd notes that the difference between frontier and boundary somehow coincides with the difference between two functions of borders, namely as gates and walls.[32]

However, under public international law, a state's sovereignty ends only at the border itself. A state is therefore free to extend all its activities up to the borderline, subject of course to international obligations which may for example prevent certain activities in border area or regulate the position of inhabitants on both sides of the border.[33] The concept of frontier zone as such is however unknown to public international law.[34] The arbitrary tribunal in the *Lac Lanoux* clearly rejected an argument to the contrary by Spain:

> "As for recourse to the notion of the 'boundary zone', it cannot, by the use of a doctrinal vocabulary, add an obligation to those sanctioned by positive law."[35]

Political scientists often use the terms borders, boundaries and frontiers interchangeably, as do instruments of public international law. For the purpose of this thesis the use of the term border will be preferred, referring to the outer limit of a state's land territory or territorial sea, as well as a state's airports and sea ports serving international destinations.

3. Sovereignty, Territory and Borders

Ruggie has observed that the "central attribute of modernity in international politics has been a peculiar and historically unique configuration of territorial space, known as the Westphalian system of states."[36] Modern public international law has been shaped on the basis of this system

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[31] Lapradelle, P., *supra* note 16, 234.
[32] O'Dowd, L., 'Frontiers of Sovereignty in the New Europe', in: O'Dowd, L. and Wilson, T. (Eds), *Borders, Nations and States* (Aldershot, Avebury, 1996), 7.
[33] Bothe, M., 'Boundaries', in: Bernhardt, R. (Ed.), *Encyclopedia of Public International Law, Volume I, No 10* (Amsterdam, North Holland, 1992), 447. The demilitarization of a border area between two former warring states can result in a *de facto* frontier zone.
[34] De Visscher, C., *Problèmes de Confins en Droit International Public* (Paris, Pedone, 1969), 13. Cf. the decision of the Arbitral Tribunal in *La délimitation de la frontière maritime entre la Guinée-Bissau et le Sénégal*: « La frontière est la ligne formée par la succession des point extrêmes du domaine de validité spatiale des normes de l'ordre juridique d'un Etat » (31 July 1989, *Revue générale des droit international publique*, 253), quoted in: Verhoeven, J., *Droit International Public* (Brussels, De Boeck & Larcier, 2000), 499.
[35] *Lac Lanoux Arbitration* (Spain/France), 24 *ILR* 101 (1957), 129.
[36] Ruggie, J., 'Territoriality and Beyond: Problematizing Modernity in International Relations', 47 *International Organization* 1 (1993), 144.

of independent, territorially defined, sovereign states. In relations between states, sovereignty refers to the legal personality under public international law, internally it expresses the supremacy of the governmental institutions.[37]

The function of borders is both inward and outward looking.[38] Borders define the outer limit of state sovereignty beyond which a State has no comprehensive claim of jurisdiction and beyond which other States infringe the principle of non-intervention.[39] Sovereignty and jurisdiction, both fundamental concepts in public international law, can only be understood in relation to territory.[40] It is within and in relation to a geographic territory that states are supremely authoritative.[41] Under the classic doctrine of state sovereignty, the state has an absolute and exclusive power of control over its territory and its inhabitants. In the *Island of Palmas* case Judge Huber stated: "Territorial sovereignty (…) involves the exclusive right to display the activities of a State."[42]

Jurisdiction, as an expression of sovereignty, concerns "the extent of each state's rights to regulate conduct or the consequences of events."[43] The term may refer to the power to legislate (prescriptive jurisdiction), to adjudicate (judicial jurisdiction) or to enforce. As a presumption jurisdiction is territorial; enforcement jurisdiction is exclusively territorial.[44] The Permanent Court of International Justice held in the *SS Lotus* Case:

> "[t]he first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention."[45]

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[37] Shaw, M., *International Law* (Cambridge, CUP, 2003), 409.
[38] Bothe, M., *supra* note 33, 447.
[39] *Ibid*. As the ICJ held in *Corfu Channel* (UK/Albania): "[b]etween independent States, respect for territorial sovereignty is an essential foundation for international relations.": *ICJ Reports* (1949), 35. The continuing relevance of the latter element was evidenced in May 2007 when Iran captured fifteen British marines, who allegedly found themselves in the country's territorial waters: 'Seized sailors "held in Tehran"' (*BBC News*, 26 March 2007).
[40] Shaw, M., supra note 37, 409.
[41] Philpott, D., 'Sovereignty' (Stanford Encyclopaedia of Philosophy, 17 March 2009)
[42] *Island of Palmas* (USA/Netherlands), 2 *RIAA* 829 (1928), 29.
[43] Oppenheim, L., *Oppenheim's International Law* (Harlow, Longman, 1992), 456.
[44] Brownlie, I., *Principles of Public International Law* (Oxford, Clarendon Press, 1998), 301.
[45] *SS Lotus* (France/Turkey), *PCIJ Reports*, Series A (1927), No 10, 18.

In today's world many processes are transnational and many "circuits of power" exist with only limited links to the state.[46] This has given rise to the claim that the Westphalian state system is in decline. Globalisation would make it increasingly difficult for states to effectively regulate transnational activities, whilst an increasing web of legal obligations under public international law would curtail states' room for maneuver. An emerging global human rights regime, but also the far-reaching integration in the framework of the European Union, are often mentioned as prime examples of those. Because of the intimate link between sovereignty, territory and borders, this alleged demise of the state deserves more critical attention, not in the least because this study examines the management of the borders of a non-state entity.

4. Decline of the State?

The classic economic definition of globalisation is synonymous with international economic integration.[47] In this sense, neither globalisation, nor the proclamation of the end of the state's authority is new. Already the first era of globalisation, roughly from 1850-1914, was characterized by rapid growth in international trade and investments, the removal of barriers to trade, better means of transportation and mass migration. Also then it was claimed that it would "only be a matter of time until the state would just be one among many human associations, at best quantitatively, but by no means qualitatively, distinct from them."[48] Although contemporary globalisation has been found to be deeper and broader, the medium to long term effects of the international financial crisis remain to be seen.[49]

The globalisation of law, either through the convergence of legal systems, private regulation or treaty regimes, remains a very limited phenomenon.[50] Moreover, the quantity of obligations by which a state binds itself under public international law does not as such affect its

[46] Walker, N., 'Late Sovereignty in the European Union', in: Walker, N. (Ed.), *Sovereignty in Transition* (Oxford, Hart Publishing, 2003), 6.
[47] Gavin, B., *The European Union and Globalisation: Towards Global Democratic Governance* (Cheltenham, Edward Elgar, 2001), 3.
[48] Morgenthau, H., 'The Problem of Sovereignty Reconsidered', 48 *Colum L Rev* 3 (1945), 342, referring to the work of Barker, E., *Church, State and Study* (London, Methuen, 1930), 151.
[49] Bordo, M. *et al.*, 'Is Globalization Today Really Different than Globalization a Hundred Years Ago?' (Cambridge, NBER Working Paper No 7195, June 1999), 4. The OECD has already warned against protectionism: OECD, 'Globalisation and Emerging Economies' (Policy Brief, March 2009), 5.
[50] Shapiro, M., 'The Globalization of the Law,' 1 *Ind J of Global Legal Stud* 1 (1993-1994), 37.

sovereignty. The question of how far the government of a state through treaties under international law may restrict that state's freedom of action is a question of politics.[51] Such constraints are first and foremost a self-limitation, resulting from the exercise of the sovereign power to conclude international agreements.[52] The characterization of the WTO Agreement by the Appellate Body is telling in this respect:

> "The WTO Agreement is a treaty - the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as members of the WTO they have agreed to exercise their sovereignty according to commitments they have made in the WTO Agreement."[53]

A tension between human rights and sovereignty may be considered "constitutive of the modern interstate system."[54] Some authors consider that the proliferation of international human rights instruments constrains sovereign states' freedom of action.[55] However, as argued by Joppke, liberal states, for which the protection of human rights is part of their legal culture, are "self-limited rather than globally limited."[56] At various occasions the European Court of Human Rights (ECtHR) has held that the international jurisdiction of human rights, reinforces or complements domestic jurisdiction.[57]

Territoriality, a key element of sovereignty, may be defined as spatially defined political rule, or alternatively as "a spatial strategy to affect, influence or control resources and people, by

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[51] Kelsen, H., 'Sovereignty and International Law,' 48 *Geo LJ* 4 (1960), 637.
[52] See for the classic authority: *SS Wimbledon* (UK, France, Italy, Japan and Poland/Germany), *PCIJ Reports*, Series A (1927), No 1, 25.
[53] *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body (AB-1996-2) DRS 1996: I, 108.
[54] Boaventura de Sousa Santos, C., *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London, Butterworths LexisNexis, 2002), 223.
[55] Jacobson, D., *Rights across Borders: Immigration and the Decline of Citizenship* (London, John Hopkins University Press, 1996); Sassen, S., *Losing Control - Sovereignty in an Age of Globalization* (New York, Columbia University Press, 1996); Soysal, Y., *Limits of Citizenship* (Chicago, Chicago University Press, 1994).
[56] Joppke, C., *Immigration and the Nation-state: The United States, Germany and Great Britain* (Oxford, OUP, 1999), 264.
[57] See e.g. *Ankerl v Switzerland* (Appl. No. 17748/91), ECtHR, 23 October 1996, para. 34 and *Selmouni v France* (Appl. No. 25803/94), ECtHR, 28 July 1999, para. 74.

controlling an area."[58] The decline of the sovereign state has often been described as a decline in the importance of territoriality. In Beck's words: "the association of place with community or society is breaking down."[59] It has been argued that power need not necessarily be organized territorially by the use of linear, exclusive boundaries, nor does power require to be organized territorially at all.[60]

However, as long as nations will continue to exist and identify themselves as such, there will be a strong link between people and land, forming a crucial part of that national identity.[61] A normative argument in defence of territoriality is that the territorial state constitutes "the only entity successful in providing an arena in which all in the defined territory have access to common institutions and the equal protection of law."[62] Others have pointed out the equalitarian character of territoriality in more general.[63] Modern constitutions have conceived civil and social rights as rights of the person residing in the territory of the state irrespective of their citizenship status.[64] In the words of Arendt:

> "Freedom, where it existed as a tangible reality, has always been spatially limited. This is especially clear for the greatest and most elementary of all negative liberties, the freedom of movement; the borders of national territory or the walls of the city state comprehended and protected a space in which men could move freely…"[65]

More factually, Clark has argued that "[a]part from a few isolated and oft-repeated examples - such as the internet and financial networks - most other human activities and relations appear to

[58] Kahler, M., 'Territoriality and conflict in an era of globalization', in: Kahler, M. and Walter, B., *Territoriality and conflict in an era of globalization* (Cambridge, CUP, 2006), 3; Sack, R., *Human Territoriality: Its Theory and History* (Cambridge, CUP, 1986), 19.
[59] Beck, U., *What is Globalisation?* (Cambridge, Polity Press, 2000), 74.
[60] Ruggie, J., *supra* note 36, 149 and Forsberg, T., 'Beyond Sovereignty, Within Territoriality: Mapping the Space of Late-Modern (Geo) Politics', 31 *Cooperation and Conflict* 4 (1998), 363-364.
[61] Walzer, M., *Spheres of Justice* (New York, Basic Books, 1983), 44.
[62] Schachter, O., 'The Decline of the Nation-State and its Implications for International Law', 36 *Colum J Transnat'l L* 7 (1998), 22.
[63] Forsberg, T., *supra* note 60, 376.
[64] Joppke, C., *supra* note 56, 271.
[65] Arendt, H., *On Revolution* (London, Penguin Books, 1990), 275. See also Arendt, H., *The Promise of Politics* (New York, Schocken, 2005), 119. However, Arendt does not necessarily define political space only territorially, nor does she define territory as merely geographical: Lindhal, H., 'Finding a place for freedom, security and justice: the European Union's claim to territorial unity', 28 *ELRev* 4 (2004), 468.

be steadfastly grounded, even if not wholly territorially enclosed."[66] As Sassen has noted: "Much that we describe as global, including some of the most strategic functions necessary for globalisation, is grounded in national territories."[67] Solutions to the question of jurisdiction in cyberspace are often cast in territorial terms[68] and even non-state terrorism, has been brought back into a territorial frame with the identification of so called rogue states.[69]

Also the territorial scope of international treaties remain most commonly determined by the sum of Contracting Parties' territories. For instance, in *Soering* the ECtHR held that "Article 1 [ECHR] (…) which provides that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I' sets a limit, notably territorial, on the reach of the Convention."[70] The Court in *Banković*, confirmed that the Convention operates "in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States."[71] In *Ilaşcu* the same Court established jurisdiction of Moldova, holding *de jure* sovereignty over an area under effective control by the Russian Federation.[72]

Sovereign statehood is only one form of territorial organization, and irrespective of the fate of the territorial state, the "imagination of territorial spaces" remain forceful.[73] Processes of de-territorialization and re-territorialisation go hand in hand as one can observe units other than nation-states increase their territorial identity.[74] These entities can seldom be depicted as non-territorial, yet at the same time do not (openly) claim sovereignty.[75]

The most important example of a clearly territorial, non-state entity is the European Union. Although it carefully avoids the association with the idea of European statehood and its institutions are extremely conscious of Member States' sensitivities in this respect, there is a

[66] Clark, I. 'A "Borderless World"?', in: Fry, G. and O'Hagan, J. (Eds), *Contending Images of World Politics* (Houndmills, MacMillan, 2000), 81.
[67] Sassen, S., *supra* note 55, 14.
[68] See for instance: Spataro, J., 'Personal jurisdiction over the Internet: How international is today's shoe?', III *JTLP* 1, 2002.
[69] The use of the term rogue state emerged during the Clinton administration; George W. Bush used the expression "Axis of Evil" in his State of the Union Address on 29 January 2002.
[70] *Soering v United Kingdom* (Appl. No. 14038/88), ECtHR, 7 July 1989, para. 86.
[71] *Banković and Others v Belgium and Others* (Appl. No. 52207/99; adm. dec.), ECtHR 12 December 2001, para. 80.
[72] The ECtHR in fact established a joint responsibility of Russia and Moldova, limiting that of Moldova to positive obligations towards persons within its territory: *Ilaşcu and others v Moldova and Russia* (Appl. No. 48787/99), ECtHR, 8 July 2004, para. 331.
[73] Forsberg, T., *supra* note 60, 357.
[74] *Ibid.*
[75] *Ibid.*, 367.

"deep presumption of sovereignty implicit in the constitutional discourse of supremacy and direct effect."[76] In the famous words of the European Court of Justice (ECJ) the EC formed "a new legal order of international law for the benefit of which the states have limited their sovereign rights".[77]

Sassen has argued that sovereignty and territory remain key features of the international system.[78] They have however been "reconstituted and partly displaced onto other institutional arenas outside the state and outside the framework of nationalised territory."[79] Rather than sovereignty having come to an end, the scope and exclusivity of States' sovereignty has been limited.[80]

This interpretation carries much resemblance with the theory of legal or constitutional pluralism, in that it argues that states have been joined by other *loci* of constitutional authority. Also Held's concept of cosmopolitan sovereignty decouples sovereignty from the idea of fixed borders and territories governed by states alone.[81] In this view states do not become redundant, but they are no longer to be regarded as the sole centers of legitimate power within their borders; rather they are shaped and formed by an overarching cosmopolitan legal framework.[82] Although one can discern a resemblance with constitutional pluralism, the difference lies in the hierarchical character of an overarching framework of cosmopolitan sovereignty.

The difficulty with approaches that regard sovereignty as being vested in more than one entity, is that this is difficult to reconcile with the inner logic of sovereignty as indivisible. A possible solution is presented by Walker's concept of "late sovereignty."[83]

Walker begins by replying to the claim that states are less and less capable of exercising factual control through the use of their sovereign powers, by arguing that "the framing and ordering claim and capacity of the core or axiomatic idea [does not] depend upon the environment or behavioral field contemplated by the axiomatic idea being directly or

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[76] Walker, N., *supra* note 46, 12. See for a more discussion of these principles: De Witte, B., 'Direct Effect, Supremacy, and the Nature of the Legal Order', in: De Búrca, G. and Craig, P. (Eds), *The Evolution of EU Law* (Oxford, OUP, 1999), 177-213.
[77] In Case 26/62, *Van Gend & Loos* [1963] ECR 1 the ECJ still added "albeit within limited fields", which was subsequently omitted in Opinion 1/91 *on the Draft EEA Agreement*[1992] ECR I-2821.
[78] Sassen, S., *supra* note 55, 28.
[79] *Ibid*.
[80] Sassen, S., 'Beyond Sovereignty: De-facto Transnationalism in Immigration Policy, 1 *EJML* (1999), 194.
[81] Held, D., 'Law of States, Law of Peoples: Three Models of Sovereignty,' 8 *Legal Theory* 1 (2002), 33.
[82] *Ibid*.
[83] Walker, N., *supra* note 76.

exhaustively controlled or determined by that idea." It is therefore mistaken to equate sovereignty with a factual situation of *de facto* internal control or external independence.[84]

The core idea of sovereignty must instead be defined as a speech act, "[a] discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed (…)."[85] In doing so, the "emergence of functionally limited polities which do not claim comprehensive jurisdiction over a particular territory" allows for a conception of "*autonomy without territorial exclusivity*", i.e. to consider sovereignty in non-exclusive terms.[86] This does not however mean that these functionally limited polities can be imagined without territory. Rather, in order to be able to examine the way in which the EU manages its borders, one must identify both its powers in this field, the nature of these powers in relation to the Member States, as well as the territorial scope of their application.[87]

5. Immigration: Last Bastion of Sovereignty?

Migration laws and border controls are considered part of the core of states' sovereignty.[88] It is a maxim of public international law, that a state's territorial sovereignty encompasses a general power to regulate the entry and exit of persons, to the point of completely closing its borders.[89] Torpey has shown how the development of the modern nation state was not only characterised by the effective monopolisation by the state of the use of force, but also of the control over the legitimate means of movement of people, even if these controls only became widespread with the development of bureaucracies and technologies.[90]

Cowley rightly points out that to migrate in legal terms means to attain a certain kind of status with regard to both a society and a jurisdiction, which although related to a territory is not

[84] This constitutes a "descriptive or constative fallacy": Werner, W. and De Wilde, J., 'The Endurance of Sovereignty', 7 *EJIR* 3 (2001), 285.
[85] Walker, N., *supra* note 76, 6.
[86] *Ibid.*, 23.
[87] This will be done in Chapters III and IV respectively.
[88] Tilly, C., *Coercion, Capital and European States* (Oxford, Basil Blackwell, 1990), 96-97.
[89] See for a critique: Nafizger, J., 'The General Admission of Aliens under International Law', 77 *AJIL* 4 (1983), 804-847. For a defense of this point of view from the perspective of political theory, see: Walzer, M., *supra* note 61 and a challenge thereof: Carens, J., 'Aliens and Citizens, The Case for Open Borders', 2 *Rev of Pol* 49 (1987), 251-273.
[90] Torpey, J., The invention of the Passport: surveillance, citizenship, and the state (Cambridge, CUP, 2000), 7.

exhaustively defined by it.[91] He does however concede that migration inevitably involves the physical crossing of borders. Here we shall focus on this particular instance, namely the rules of public international law that govern an individual's physical access to a state's territory.

Increasing global interconnectedness and rising differences in wealth distribution fuel migration movements.[92] While countries increasingly open their borders to the flow of goods, services and capital, they are keen to invoke their sovereign rights to restrict the entry of people. This may be regarded as the major paradox of present day globalisation. Although legal writing tends to confirm the principle of territorial sovereignty as an absolute power for the state over its borders, the interpretation thereof often approaches the more liberal position adopted by Nafziger that states are under "a qualitative duty to admit aliens when they pose no threat to the public safety, security, general welfare, or essential institutions of a recipient state."[93] In practice however even the potentially most important limitation on a state's power over the entry of aliens, international asylum law, leaves state sovereignty largely in tact.[94] The exclusion of non-nationals with a reference to the territorial sovereignty of the states, serves as evidence that a classical legal discourse continues to shape migration law.[95] As Dauvergne has noted, the emerging global human rights regime has not "markedly increased rights entitlements at the moment of border crossing, nor has it significantly increased access to human rights for those with no legal status."[96] Salter has rightly pointed out the paradoxical situation at states' borders where "one may claim no rights but is still subject to the law.''[97]

There are few comprehensive international rules on the free movement of persons. The UN International Convention on the rights of migrant workers and their families entered into force on

[91]Cowley, J., 'Locating Europe', in: Groenendijk, K., *et al.* (Eds), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 33.
[92] In 2005, some 191 million people, amounting to 3 per cent of the world's population, lived outside their country of origin: GCIM, 'Migration in an interconnected world: New directions for action' (Report, October 2005), 1.
[93] Nafiziger, *supra* note 89, 804. As Hathaway points out such approach would shift the burden of proof on the state aiming to restrict migration: Hathaway, J., Book Review, 88 *AJIL* 3 (1994), 564.
[94] Joppke, C., *supra* note 55, 265.
[95] Cornelisse, G., 'European Integration and Immigration by Third-Country Nationals: The Obduracy of the National Border' (December 2007).
[96] Dauvergne, C., 'Sovereignty, Migration and the Rule of Law in Global Times', 67 *MLR* 4 (2004), 613.
[97] Salter, M., 'The Global Visa Regime and the Political Technologies of the International Self: Borders, Bodies, Biopolitics', 31 *Alternatives* 2 (2006), 169.

1 July 2003, but the most important receiving states have failed to ratify it.[98] Most significantly, it does not contain rules on the crossing of the contracting states' borders.

The General Agreement on the Trade in Services (GATS), part of the World Trade Organization Agreements, deals with some aspects of free movement of persons related to the provision of services.[99] Two basic principles govern the functioning of the GATS: the most favoured nation (MFN) treatment and national treatment. The MFN treatment requires that the most favourable treatment given to a third country be extended to parties to the GATS.[100] The national treatment requires that nationals of parties to the GATS will be accorded equal treatment to nationals of the receiving state.[101] Members may invoke exceptions from the MFN treatment in the case of "economic integration agreements" or "labour market integration agreements."[102]

The GATS Annex on the movement of natural persons under the agreement stipulates that GATS shall not prevent governments from applying measures to regulate the entry of natural persons into their territory, or to regulate their temporary stay, or protect the integrity of borders and the orderly movement of natural persons across them. Member States discretion is somewhat circumscribed by the second part of this proviso that such measures may not be applied in ways as to "nullify or impair the benefits accruing to any Member".[103] Nonetheless, it may be concluded that "the WTO supervision of national regulation of the movement of people is much weaker than its supervision of goods, other services, and technology, and applies to a very narrow segment of international migration".[104] Moreover, the GATS requires equality of treatment, rather than an opening of the market to foreign service providers, which means a protectionist government may still act in full compliance of its GATS obligations.[105]

[98] 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 *UNTS* I-39481.
[99] Mode 4 of the so called 'Modes of Supply of Services', Article I(2)(d), GATS. Note that the service concept in the GATS covers both the Community freedom of services and the freedom of establishment.
[100] Article II, GATS
[101] Article XVII, GATS
[102] Articles V and Vbis, GATS
[103] Article 4, GATS Annex on Movement of Natural Person Supplying Services under the Agreement.
[104] Newland, K., 'The Governance of International Migration: Mechanisms, Processes and Institutions', (Migration Policy Institute, Paper prepared for the Policy Analysis and Research Programme of GCIM, September 2005), 10.
[105] Charnovitz, S., 'Trade Law Norms on International Migration', in: Aleinikoff, T. and Chetail, V. (Eds), *Migration and International Legal Norms* (The Hague, T.M.C. Asser Press, 2003), 246.

Once more, the EU is unique in its regulation of intra-Community migration of nationals of EU Member States.[106] The free movement of persons is one of the four fundamental Treaty freedoms. Even if the right of free movement was initially limited to the economically active, the Community legislator has been progressively expanding this right through secondary legislation, which has moreover been interpreted broadly by the ECJ. From an early stage most EU nationals could invoke a right to cross an intra-Community border merely upon producing a passport or other identity document proving nationality of one of the Member States.[107] Intra-community border controls have now been fully abolished between the majority of Member States that form part of the Schengen area. However, the lifting of border checks has been accompanied by a reinforcement of controls at the common external borders. The transfer of the logic of national border control to the external borders forms a clear example of re-territorialisation rather than de-territorialisation.[108] Therefore commentaries on the changing nature of borders in Europe refer mostly to the borders between Member States.

It has been submitted that in the field of migration control supranational cooperation, instead of limiting Member States' sovereignty, is actually enhancing it.[109] Although there may be a valid point in the argument that by "going supra-national" Member States may evade certain legal constraints at the national level or simply increase their capabilities for control, this would mean considering sovereignty as a state of affairs, rather than as a claim to ultimate ordering power. One therefore would have to agree with Koslowski that, regardless of its purpose, policy integration does transform sovereignty.[110]

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[106] Indeed, the reference to the EU here is too broad and too narrow at the same time. One should take account of the variable geometry resulting from the Schengen *acquis* as well as the EEA Agreement. A detailed examination of these agreements will follow in Chapters IV and VI.

[107] See in more detail Chapter V.

[108] Harvey, C., 'The Right to Seek Asylum in the European Union' 1 *EHRLRev* 17 (2004), 31.

[109] See for instance: Freeman, G., 'The Decline of Sovereignty? Politics and Immigration Restriction in Liberal States', in: Joppke, C. (Ed.), *Challenge to the Nation State: Immigration in Western Europe and the United States* (Oxford, OUP, 1998), 91. It has further been argued that sovereignty is enhanced because of the greater independence of the executive on the Community level, thus being less constrained by national (human rights) limits: Lavenex, S., 'Shifting Up and Out, The Foreign Policy of European Immigration Control', 20 *WEP* 2 (2006), 331. Although I am hesitant to equate the executive with state sovereignty, the increasing importance of the executive branch of government as a result of globalisation has also been pointed out by Sassen, S., 'Shaking up Citizenship' (18th Annual Globalisation Lecture, Amsterdam, 20 April 2006).

[110] Koslowksi, R., *Migrants and Citizens: Demographic Change in the European State System* (Ithaca, Cornell University Press, 2000), 166-167.

The clearest compromise between "the exclusive power of the state over entry into and presence in its territory (…) and the competing humanitarian impulse to aid strangers in necessitous circumstances" can be found in asylum law.[111] The 1951 Geneva Convention relating to the Status of Refugees does not provide for a right to asylum, nor does any other international instruments. The 1967 Declaration on Territorial Asylum re-iterates that the granting of asylum is "an exercise of sovereignty".[112] The Geneva Convention does contain in Article 33(1) the obligation of *non-refoulement*, meaning that no country may deport a person to a country where that person faces persecution, or risk of serious human rights violations. The principle of *non-refoulement* is now widely accepted as being customary law.[113]

The Geneva Convention cannot be invoked by a person who is still within the territorial jurisdiction of his/her country of habitual residence.[114] However, it has been argued that once outside the country of origin the principle of *non-refoulement* must apply.[115] There is a broad consensus that this is indeed the case as regards rejection at a state's border. This implies that there is a right to physically cross a state border when presenting oneself with an asylum claim at that border, although the Convention itself is not explicit on this point.[116] Robinson, writing in 1953, still argued that Article 33(1) of the 1951 Convention does not apply to refugees who seek entry into the territory of a contracting state.[117] In his words "if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck."[118] However, Article 3(1), of the UN Declaration on Territorial Asylum makes clear that a person seeking asylum shall not be rejected at the border.[119] According to the interpretation of the United Nations High Commissioner for Refugees (UNCHR), non-rejection at the border within the interpretation of

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[111] Fitzpatrick, J., 'Flight From Asylum: Trends Towards Temporary "Refuge" and Local Responses to Forced Migrations', 35 *Virginia J Int'l L* 1 (1994), 34-35.
[112] Article 1(1), UNGA Resolution 2312 (XXIX), Declaration on Territorial Asylum, 14 December 1967.
[113] Edwards, A., 'Human Rights, Refugees, and The Right "To Enjoy" Asylum', 2 *IJRL* 17 (2005), 301.
[114] Definition of "refugee", Article 1A(2), 1951 Geneva Convention.
[115] Fischer-Lescano, A. *et al.*, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law,' 21 *IJRL* 2 (2009), 267.
[116] Noll, G., 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *IJRL* 3, 548.
[117] Robinson, N., *Convention Relating to the Status of Refugees* (New York, Institute of Jewish Affairs 1953), 163; See also Grahl-Madsen, A., *The Status of Refugees in International Law - Volume II. Asylum, Entry and Sojourn* (Leiden, Sijthoff, 1972), 94 and Maasssen, H.-G., *Die Rechtsstellung des Asylbewerbers im Völkerrecht* (Frankfurt am Main, P. Lang, 1997), 97.
[118] Robinson, *ibid*.
[119] Declaration on Territorial Asylum, *supra* note 112. As Weis notes this is a wider interpretation of the principle than can be found in the *travaux préparatoires* of the 1951 Convention: Weis, P., 'The United Nations Declaration on Territorial Asylum', 7 *Can YB Int'l L* (1969), 142.

the principle.[120] Within the EU, Article 3(1) of the Dublin II Regulation on determining the Member State responsible for examining an asylum application stipulates that a Member States shall examine the application for asylum made *at the border* or in their territory.[121]

It is important to note that the ECtHR has ruled that for the purpose of the European Convention of Human Rights (ECHR), international transit zones, *e.g.* at airports, do not have extraterritorial status despite their name.[122] Therefore, Contracting Parties cannot withhold the rights arising under the ECHR to someone who is physically present in the territory by denying him/her legal presence through the fiction of extra-territoriality. Under Article 3(1) of the Dublin II Regulation, Member States would therefore have to consider persons in transit as being "within their territory." Australia has under its "Pacific Solution" exempted parts of its territory from the application of its asylum rules.[123] In the United States, the "white foot, wet foot" policy exempted in a similar way territorial waters from its asylum and immigration laws in respect of Cuban nationals.[124]

While states have attempted to shift the legal - as opposed to the territorial - border inwards, they have likewise sought to shift it outwards, by erecting pre-border legal obstacles preventing asylum seekers and irregular migrants from actually reaching a state's territory. In this respect the term "remote policing" has been applied to refer either to specific procedures and technologies, such as pre-boarding procedures or visa-requirements, as well as the deployment of police officers or private actors outside national territory.[125] The result is that the individual

[120] UNHCR Executive Committee, Conclusion No 6 (XXVIII) "Non-Refoulement": Report of the 28th Session: UN doc A/AC.96/549, para 53.4 (1977) and Conclusion No 22 (XXXII) "Protection of Asylum- Seekers in Situations of Large-Scale Influx": Report of the 32nd Session: UN doc A/AC.96/601, para. 57.2 (1981).
[121] Council Regulation (EC) No 343/2003 (Dublin II) establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003, L50/1 (hereinafter: Dublin II Regulation).
[122] *Amuur v France* (Appl. No. 19776/92), ECtHR, 25 June 1996, para. 52.
[123] Migration Amendment (Excision from Migration Zone) Act 2001. See: Morris, J., 'The Spaces in Between: American and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime, *21 Refuge* 4 (2003), 58. A change of government in 2007, brought the Pacific Solution to an end: 'Australia ends "Pacific Solution"' (*BBC News*, 8 February 2008). A 'Migration Legislation Amendment (Migration Zone Excision Repeal) Bill 2006,' is pending.
[124] The policy results from a 1995 agreement with Cuba under which Cuban nationals which make it to US soil ("dry foot") are admitted, whereas those that are intercepted ("wet foot") are returned to Cuba, or in case of fear of persecution resettled in other countries. The policy is formally know as the 1994 US-Cuba Immigration Accord and has been written in to law as an amendment to the 1966 Cuban Adjustment Act, Public Law 89-732, 2 November 1966.
[125] Bigo, D. and Guild, E., 'Policing at Distance: Schengen Visa Policies', in: Bigo, D. and Guild, E., *Controlling Frontiers: Free Movement Into and Within Europe* (Aldershot, Ashgate, 2005), 234.

him/herself has become an additional "site of regulatory enforcement control" and that borders have multiplied.[126]

A number of national cases serve to illustrate the importance of territory in the way in which states assert their presumed "sovereign right to exclude."[127] In the *Sale* Case[128], the US Supreme Court ruled on the conformity of an executive order directing the US Coast Guard to intercept vessels on the High Seas carrying Haitians who had fled their home country and turning them back to Haitian territorial waters, before determining whether they qualified as refugees.

The majority of the Supreme Court, Blackmun J dissenting, did not consider the order to be in breach of the principle of *non-refoulement*. Even though the type of interdictions at issue:

> "may (…) violate the spirit of Article 33 (…) a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions."[129]

The Australian High Court ruled in a similar vein in the *Ibrahim* case:

> "The provisions of the Convention "assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting State"[130]

The Inter-American Commission on Human Rights however found the US to have violated Article 33(1) of the Geneva Convention, sharing the view of the UNHCR in its *Amicus Curiae* brief before the US Supreme Court, in which it concluded Article 33 knows no geographical limitations.[131] It also considered the US to have acted in violation of Article XXVII of the American Convention on Human Rights which provides for a right to seek and receive asylum in

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[126] Sassen, S., *supra* note 67, 69.
[127] This chapter will not engage in a broader examination of the possible extra-territorial application of the principle of *non-refoulement*. Where relevant, we will return to this point in Chapter X in relation to the extra-territorial border controls at sea by the EU Member States. For an extensive discussion see *inter alia*: Noll, G., *supra* note 116 and Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control* (PhD thesis, Aarhus University, 2009), 116 ff.
[128] *Sale Acting Comr, Immigration and Naturalization Service v Haitian Centres Council Inc* [1993] 509 *US* 155.
[129] *Ibid*., 183.
[130] *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] 174 *ALR* 585, para. 136. See also: *Minister for Immigration and Multicultural Affairs v Khawar and others* [2002] 187 *ALR* 574, para. 42.
[131] Case 10.675, *The Haitian Centre for Human Rights et al. v United States*, Report No 51/96, *Inter-AmCHR*, OEA/Ser.L./V/II.95 Doc. 7 rev. (1997), para. 157.

a foreign territory. The interdiction and return operations effectively prevented Haitians from seeking asylum in other countries in the region.[132]

In *R. v. Immigration Officer at Prague Airport* the House of Lords was asked to rule on the legitimacy of the posting of British immigration officials at Prague Airport whose task was to prevent asylum seekers, predominantly of Roma ethnicity, from boarding planes bound for the UK.[133] As Lord Bingham of Cornhill, who presented the majority opinion, argued, the principle of *non-refoulement* was to no avail to the applicants, who:

> "have not left the Czech Republic nor presented themselves, save in a highly metaphorical sense, at the frontier of the United Kingdom."[134]

Nevertheless, three of the five concurring opinions paid attention to the Sale case in an *obiter dictum*. Lord Bingham of Cornhill considered that the Inter-American Commission of Human Rights had "understandably" found a breach of the Geneva Convention.[135] He distinguished the situation of the applicants from those of the Haitians, who, although not in the United States, were outside Haiti, the country of their nationality, and thus the implication seems to be that they were entitled to protection under the principle of *non-refoulement*.

Lord Hope of Craighead also distinguished the *Sale* Case in that the refugees in that case had already reached the High Seas. Nonetheless he considered the decision in *Sale* to be correct:

> "The issue in that case was not as to what was or was not fair. The majority recognised the moral weight of the argument that a nation should be prevented from repatriating refugees to their potential oppressors whether or not the refugees were within that nation's borders (…) But in their opinion both the text and the negotiating history of article 33 affirmatively indicated that it was not intended to have extraterritorial effect."[136]

Although the Decision of the Inter-American Commission seems to support the argument that international bodies and human rights norms constitute an effective check on government action

[132] *Ibid*., para. 162.
[133] *R. v Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.* [2004] *UKHL* 55, 9 December 2004.
[134] *Ibid*., para. 26.
[135] *Ibid*., para. 21.
[136] *Ibid*., para. 68.

in the field of migration, it should be recalled that the United States has not accepted jurisdiction of the Inter-American Court.[137]

The House of Lords did eventually condemn the operation as, in the words of Baroness Hale of Richmond, "inherently and systematically discriminatory" against Roma passengers and therefore unlawful under both domestic and international customary and treaty law.[138] In that respect the case supports the argument that constraints on national migration control policy have to a large degree been derived from national law and enforced by national courts.[139]

6. Conclusion

This chapter has aimed to give an overview of the most important rules of public international law covering both the definition of territorial borders under public international law and the right to cross a state's territorial border. It has showed notwithstanding assertions to the contrary, territorial borders retain their importance in the public international legal order.

The explanation must first of all be found in the continuing relevance of states within the public international legal order. Moreover, sovereignty and in particular its key element territoriality continue to inform modern day thinking on legal and political organisation even if these concepts are no longer necessarily confined to the straightjacket of the Westphalian state.

The distinction between sovereignty as a state of affairs and as a speech act, is well reflected in the discussion on migration. Illegal migration is an affront to sovereignty because it is evidence that a nation is not in control of its borders.[140] Although from a legal point of view states indeed remain the most important actors in deciding on the entry and exit of aliens, in practice states generally have "no choice but to assert the prerogative of sovereignty against the recognition of their failure to effectively control migration flows."[141]

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[137] Unlike under the ECHR, under the American Convention on Human Rights, cases can be referred to the Court only by the Inter-American Commission on Human Rights or a state party. In case the Commission finds a violation it will first make recommendations. If the State continues to act in breach of its human rights obligations under the Convention, or when it finds the case of particular importance or legal interest, it will refer the case to the Court.
[138] *R. v Immigration Officer at Prague Airport*, *supra* note 133, paras 97-98.
[139] Guiraudon, V. and Lahav, G., 'A Reappraisal of the State Sovereignty Debate: The Case of Migration Control', 33 *Comp Pol Stud* 2 (2000), 189.
[140] *Ibid*., 598.
[141] Boaventura, C., *supra* note 54, 223.

The example of shifting borders may be invoked to support the argument that one should move attention away from the territorial border.[142] At the same time however, they underline the continuing importance of a territory and its borders, which remain firmly in place. It is one's presence within these borders that brings one within the territorial jurisdiction and the protection of the state in question. As the reward of having evaded pre-border controls and presenting oneself at the actual border becomes higher, the number of people likely to try to do so will increase. One must therefore agree with Sassen's observation that "state-centered border regimes - whether open or closed - remain foundational elements in our geopolity", even though indeed these "coexist with a variety of other bordering dynamics and capabilities".[143]

[142] Cowley, J., *supra* note 91, 34.
[143] Sassen, S., 'When National Territory is Home to the Global: Old Borders to Novel Borderings', 10 *New Pol Econ* 4 (2005), 535.

III. EU Powers in Border Management

1. Introduction

The European Union is not a state. Bearing in mind Walker's concept of late sovereignty, this does not however exclude the possibility for it to dispose of competences in an area generally considered as being one of the state's core prerogatives, the control over borders. In the famous words of the European Court of Justice (ECJ) on the nature of the European Community, it constitutes "a new legal order of international law for the benefit of which the states have limited their sovereign rights."[1] A fundamental difference between the European legal order and that of its Member States is that the Union legal order is a system of attributed powers. This means that the EU does not possess a general legislative competence, a *Kompetenz-Kompetenz,* but that it must be possible to trace back the EU's actions to a particular legal basis laid down in the founding treaties. The question of whether the EU has a power to act is of fundamental constitutional importance. The system of attributed powers is one of the "defining features of the relationship between the Community and its Member States."[2]

Anderson and Bigo state that the European Union does have one of the characteristics of a state, namely "clearly defined borders, with control and surveillance procedures in place."[3] However, the question of how far these borders are indeed well defined is closely connected to the question of which powers relating to the entry and exit of persons into the Member States' territory have been carried over from the national to the EU level and the territorial scope of these rules. This chapter will study the process through which the EU has acquired competences for the management of the external borders and how these competences define the nature of these borders.[4]

While in the previous chapter emphasis was laid on the territorial element of sovereignty, for the purposes of this chapter it is worth recalling two further definitions of

[1] In Case 26/62, *Van Gend & Loos* [1963] ECR 1 the ECJ still added "albeit within limited fields", which was subsequently omitted in Opinion 1/91 *on the Draft EEA Agreement* [1991] ECR I-2821.
[2] Dashwood, A., 'The Attribution of External Relations Competence', in: Dashwood, A. and Hillion, C. (Eds), *The General Law of EC External Relations* (London, Sweet & Maxwell, 2000), 116.
[3] Anderson, M. and Bigo, D., 'What are EU Frontiers for and what do they mean?', in: Groenendijk, K., *et al*. (Eds), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 13. 7-26
[4] Later chapters will examine the use that has been made of these competences: Chapters VIII, IX, X.

sovereignty and the state. In the words of Weber the state is "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."[5] According to Schmitt, "[s]overeign is he who decides on the exception," that is he who has the power to step outside the rule of law and call for the state of emergency.[6] The first definition is of importance because border management potentially includes the use of force, the second, because borders are still considered to have an important role in protecting a state's internal and external security.[7] This policy area may therefore be able to inform our understanding of the EU and the way in which the European polity evolves.

2. External Borders and the Single Market Objective

From the outset, the establishment of a common market formed one of the main objectives of the EC. In accordance with the functional principles of an economic integration process this objective pursued not only the free circulation of capital, goods and services, but also of the factors of production themselves, "the capital of men".[8] As early as 1974 the conclusions of the Heads of State and of Government meeting in Paris on 9 and 10 December 1974 called for an examination of the possibility of establishing a Passport Union and in particular of abolishing passport control within the Community. In the course of 1984 and 1985 various European Council Conclusions called upon the Commission to take action in order to complete the common market as a means of relaunching the European project. In particular it asked the Commission to draw up a detailed programme with a specific timetable for the completion of a single market.[9] This became the Commission's White Paper on the completion on the internal market, which provided the foundations for the adoption of the Single European Act (SEA).[10]

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[5] Weber, M., *The Vocation Lectures* (Indianapolis, Hackett Publishing Company, 2004), 33.
[6] Schmitt, C., *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago, The University of Chicago Press, 1985, 5.
[7] See also Chapter V. One may add that borders themselves can be viewed as sites of exceptional measures (identity and security checks, closure): Vaughan-Williams, N, 'Borders Territory, Law', 2 *IPS* 4 (2008), 329.
[8] Farkas, O., 'Free movement and European Citizenship: leaving behind the labour supply approach' (Paper presented at the EUI Alumni Association Interdisciplinary Conference, Florence, 5-6 October 2006), 3.
[9] See e.g. the Resolution of the Council and the representatives of the governments of the member states of the European communities, meeting within the Council, on free passage across the Community's internal frontiers for Member State nationals, 19 June 1984 and the Brussels European Council Conclusions, 29-30 March 1985.
[10] COM(85) 310 final, Commission White Paper, 'Completing the Internal Market'. See for a concise overview of the political dynamics that allowed for the adoption of the SEA: Craig, P. and De Búrca, G., *EU Law: Text, Cases and Materials* (Oxford, OUP, 2003), 1170-1179.

The SEA inserted the current Article 14 EC which provides for the establishment of the internal market, defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." The following quotations from the Commission's White Paper show that the removal of internal borders was not merely for the sake of reaping the economic benefits, but also in order to contribute to a "peoples' Europe":

> "The formalities affecting individual travellers area are a constant and concrete reminder to the ordinary citizen that the construction of a real European Community is far from complete.
>
> Even though these controls are often no more than spot checks, they are seen as the outward sign of an arbitrary administrative power over individuals and as an affront to the principle of freedom movement within a single Community."[11]

However, the free movement of persons proved to be the most contentious of the four freedoms and completing the internal market in this area the most difficult. While the SEA introduced qualified majority voting for internal market legislation in Article 100a EC (the current Article 95 EC), the free movement of persons was explicitly excluded from the scope of this article. This exclusion of the free movement of persons only lost its relevance with the introduction of the co-decision procedure in this area by the Maastricht Treaty.

As Cornelisse notes, the limitation of the scope of free movement rights to nationals of the EU Member States is not apparent from the way in which these rights are formulated in the EC Treaty.[12] The distinction between nationals of the Member States and Third Country Nationals (TCN) has however been applied from the outset and endorsed by the ECJ. Since the free movement of persons excludes TCNs, it was not at all evident that the area without internal frontiers was to be interpreted so as to mean an area without border checks.[13] In fact the UK, a Member State in which immigration control has always relied much more on entry and exit control rather than on controls within the territory, has been opposing an interpretation that would abolish checks at the internal borders.[14]

The White Paper noted that the abolition of internal frontiers would make it much easier for nationals of non-Community countries to move from one Member State to

[11] COM(85) 310 final, *ibid.*, 14.
[12] Cornelisse, G., 'European Integration and Immigration by Third-Country Nationals: The Obduracy of the National Border' (December 2007).
[13] See Case 238/83, *Caisse d'Allocations v Meade* [1984] ECR 2631, para. 7.
[14] In fact until the adoption of the Identity Cards Act 2006 (c. 15), the UK did not know a duty of identification. See also Layton-Henry, Z., 'Britain: From Immigration Control to Migration Management', in: Cornelius, W., *et al.*, (Eds), *Controlling Immigration: A Global Perspective* (Stanford, Stanford University Press, 2004), 315

another.[15] The Commission's Communication of 1988 on the abolition of controls of persons at Intra-Community borders however pointed out that it would be difficult to envisage a selective abolishing of identity controls at internal frontiers depending on whether the traveller was a Community citizen or a citizen of a third country, since nationality can only be established by applying some form of control.[16]

The Commission thus advocated an interpretation that would lead to the lifting of all checks on individuals at the internal borders of the Member States. In a Communication of May 1992, it expressed its concern on the slow progress made towards the completion of the internal market in relation to the free movement of persons, and reaffirmed that:

> "[t]he phrase "free movement of … persons" in Article 8a refers to all persons, whether or not they are economically active and irrespective of their nationality. The internal market could not operate under conditions equivalent to those in a national market if the movement of individuals within this market were hindered by controls at internal frontiers.
>
> (…)
>
> Any other interpretation of the objective of abolishing physical frontiers would render Article 8a ineffective."[17]

The point that Article 14 EC covers both the economically active and non-economically active was supported by the argument that this article was found in Part One of the EEC Treaty, entitled "Principles," thus applying to all nationals of Member States. To a large extent the Court's broad interpretation of the right to free movement of persons had already made this distinction of limited practical relevance.[18] One should however realise that the Commission observations are limited to the right to cross a Member States' border, not to more extensive rights of residence, which would still be dependent on the economic independence of the Member State's national.

The Commission White Paper argued that internal borders could not be abolished altogether until adequate safeguards against terrorism and the illicit trade in drugs were introduced. The

[15] COM(85) 310 final, *supra* note 11, 16.
[16] COM(88) 640 final, Commission Communication on the abolition of controls of persons at Intra-Community borders, 5.
[17] SEC(92) 877, final, Commission Communication on the Abolition of Border Controls, 10 and 12.
[18] See Chapter V.

Commission however recognised that these were subject areas that did not in all their aspects fall within the scope of the Treaty.[19] The White Paper further emphasised the need to find alternative means of protection for controls at the internal borders and to strengthen those already existing.[20] Increased controls at the external borders formed the obvious example.

The link between the removal of the internal border and the need for compensatory measures, in particular reinforced controls at the external borders early on became the central theme of the debate on removing checks at the internal borders.[21] Already before the publication of the White Paper, the adoption of a proposal on the basis of Article 100 EEC for a Directive on the easing - not the abolishing - of controls applicable only to EU nationals was made dependent upon the adoption of a resolution on cooperation between control authorities.[22] Two declarations made at the time of adoption of the SEA further underline the connection between the lifting of internal border checks and compensatory measures:

> *Political Declaration by the Governments of the Member States on the free movement of persons*:
>
> In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.
>
> *General Declaration on Articles 13 to 19 of the Single European Act:*
>
> Nothing in these provisions (Articles 13-19 SEA) shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.

In its 1988 Communication the Commission considered that as far as it concerned the tightening of the external borders, there was no need to propose a directive dealing

[19] COM(85) 310 final, *supra* note 11, 10.
[20] COM(85) 310 final, *supra* note 11, 10.
[21] Nanz, K.-P., 'Free Movement of Persons According to the Schengen Convention and in the Framework of the European Union', in: Pauly, A. (Ed.), *De Schengen à Maastricht: voie royale et course d'obstacles* (Maastricht, EIPA, 1996), 61-79.
[22] COM(84) 749 final, Commission Proposal for a Council Directive on the easing of controls and formalities applicable to nationals of the Member States when crossing intra-Community borders, as amended by COM(85) 224 final. See COM(88) 640 final, *supra* note 16, 17. The directive was never adopted and eventually withdrawn by the Commission.

specifically with the matter, although it added that it might want to reconsider this position in the light of progress made at the intergovernmental level.[23]

In December 1988 the Rhodes European Council set up a Group of Coordinators to oversee the plethora of intergovernmental working groups on the free movement of persons that had emerged.[24] The following year, the Madrid European Council approved a work programme for the establishment of an area without internal frontiers prepared by the Group of Coordinators. This so-called Palma document called for the approximation of national laws, collaboration between national administrations and a prior strengthening of controls at the external frontiers. It noted however the political divergences "(…) on the interpretation and scope of the relevant Treaty provisions *inter alia* 8A EC [14 EC] and the obligation flowing therefrom (…) and where the competence for taking decisions and action lay." [25]

It may come as little surprise that the way forward was an intergovernmental one. Under the responsibility of the immigration ministers work started on a "Convention on crossings at the external frontiers of the Member States." This resulted in the Member States reaching agreement in June 1991, but disagreement between the UK and Spain as regards the territorial scope of application of the Convention in relation to Gibraltar prevented the signature.

3. Bringing the External Borders within the EU Legal Framework

In the run-up to the 1991 intergovernmental conference Germany advocated the integration of the intergovernmental cooperation in justice and home affairs (JHA) that had taken shape so

[23] COM(88) 640 final, *ibid*., 34.

[24] In the mid-1970s a judicial cooperation group was established which discussed judicial cooperation in criminal and civil matters within the framework of the European Political Cooperation (EPC). The Rome European Council of 1975 created the TREVI group, which was a network of national officials from Ministries of Justice and the Interior. It developed a range of working groups, that reported to occasional ministerial meetings. One of these working groups, Trevi 92, dealt with the security issues of the free movement of people, including compensatory measures needed for the relaxation of intra-EC border controls. In addition, a number of *ad hoc* groups were created: the most important being the *Ad hoc* Working Group on Immigration (1986), the *Comité Européen de la Lutte Anti-Drogue* (1989, CELAD) and the *Groupe d'Assistance Mutelle* (1992, GAM, custom authorities): Lavenex, S. and Wallace, W., 'Justice and Home Affairs: Towards a "European Public Order"?', in: Wallace, H. *et al*. (Eds), *Policy Making in the European Union* (Oxford, OUP, 2005), 459.

[25] 'Free Movement of Persons: a Report to the European Council by the Co-ordinators Group' (Palma Document). The document was initially intended to remain confidential, but was reproduced in a Report of the House of Lords Select Committee on the EC, '1992: Border Controls of People' (HL Paper 90, Session 1988-89, 22nd Report, 1989), 55. One may consider this document an early forerunner of the 1999 Tampere Agenda and the 2005 Hague Programme, both setting the EU's agenda in JHA. Although its focus is on the free movement of persons, the measures it envisaged as necessary for the abolishment of checks at the internal borders covered illegal immigration, drug trafficking, terrorism, information exchange, co-operation between law enforcement agencies, etc.).

far outside the Community legal order, with the British government firmly opposing such a move. A Dutch draft, bringing both a common foreign security policy and cooperation on JHA under a single treaty structure, was quickly cast aside.[26] Instead the Treaty of Maastricht created the European Union with an intergovernmental Third Pillar on JHA. Only limited aspects of visa policy were brought under the "supranational" EC Treaty in Article 100c.[27]

Article K.1 of the Treaty of Maastricht defined the "rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon" as one of the "areas of common interest." Article K.3 introduced three types of acts that could be taken in relation to these areas of common interest: joint positions and the promotion of joint cooperation, joint actions and conventions. All these instruments were subject to unanimity in the Council, and in addition, conventions needed to be ratified in accordance with Member States' constitutional requirements. Some areas of common interest, including the rules governing the external borders, seem to have been less sensitive to Member States' sovereignty concerns. They were made subject to a *passarelle* clause and the Commission was given a right of initiative shared with the Member States. [28]

Article K.4 provided for a Coordinating Committee, which came to be known as the K.4 Committee, assisting the Council in JHA, without prejudice to the Committee of Permanent Representatives (Coreper).[29] Under Article 100d EC, the K.4 Committee also contributed to the preparation of the Council's proceedings in the fields referred to in Article 100c EC. The *raison d'être* of this Committee was to limit the role of ambassadors in Coreper (with a background in foreign ministries) in the affairs of interior ministers.[30] In essence, the

[26] Within the Dutch Ministry of Foreign Affairs, the day of the Council meeting at which the disproval of the other Member States of the Dutch draft became clear, Monday 30 September 1991, is still referred to as *Lundi Noir*.

[27] These included the determination of a common list of countries whose nationals required a visa and a uniform visa format. It should however be noted that the Commission was required to examine any request for measures by the Member States and that an effective implementation of an EC visa policy could be easily hampered by Member States blocking related measures under the Third Pillar: Cullen, D. *et al*., *Cooperation in Justice and Home Affairs: An Evaluation of the Third Pillar in Practice* (Brussels, European Interuniversity Press, 1996), 32-33.

[28] The *passarelle* clause (Article K.9 TEU) allowed for the possibility of applying the co-decision procedure to the first three areas of common interest, which included the rules on external borders. Such transfer was subject to a "double lock" procedure (unanimity in the Council and approval of all Member States according to their national constitutional requirements) and has never been put into effect. In the other three areas the Member States' right of initiative was exclusive (Article K.3(2) TEU). See: O'Keeffe, D, 'Recasting the Third Pillar', 32 *CMLRev* 4 (1995), 900.

[29] Article K.4(1) TEU read in conjunction with Article 155 TEC.

[30] Peers, S., *EU Justice and Home Affairs Law* (Harlow, Longman, 2000), 18 and Monar, J, 'Justice and Home Affairs', in: Edwards, G. and Wiessala, G. (Eds), *The European Union 1999/2000: Annual Review of Activities* (*JCMS*, Oxford, Blackwell, 2000), 137

K.4 Committee replaced the Rhodes Group of Coordinators and the pre-existing structure of committees and working parties that was now brought under its umbrella.

As far as the free movement of persons was concerned, the deadline for the establishment of the internal market, 31 December 1992, was not met. Guild points out that the interest of the Commission to seek abolition of the internal borders for persons may have been limited, since even after the Maastricht Treaty, powers to regulate the external borders remained intergovernmental.[31] As we saw earlier, the Commission did speak out strongly in favour of the abolition of all controls in its Communication of May 1992, also expressing its concern about the slow process of ratification of the Dublin Convention on rules determining Member States' responsibility for asylum claims and the failure to adopt the External Frontiers Convention.[32]

In 1993, at the instigation of the Copenhagen European Council, the Commission used its shared right of initiative and proposed a Council Decision adopting the External Frontiers Convention as a Third Pillar Convention.[33] Amendments to the Draft Convention were made to bring the proposal in line with the EU treaty provisions on "Third Pillar Conventions" and the post-Maastricht reality. New decision procedures for the implementation of the Convention were foreseen by Article K.3(2)(c) EU.[34] The conclusion of the EEA Agreement which extended the four freedoms of the internal market to the three EEA countries, necessitated changing the reference to nationals of the EU member states to persons having free movement rights under Community law. Articles on the crossing of goods were deleted from the draft since in the run-up to the 31 December 1992 deadline the Community legislation necessary to remove the control on goods at the external borders had been adopted.[35]

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[31] Guild, E., 'Moving the Borders of Europe' (Inaugural Lecture, University of Nijmegen, 30 May 2001), 10. This is also the view taken by Advocate General Cosmas in his opinion in Case C-378/97, *Wijsenbeek* [1999] ECR I-6207, para. 71. It may be argued that, had there been the political will to do so, it would have been possible to regulate aspects of the external borders under the Treaty provisions on the free movement of persons. Support for this argument may be found in: De Witte, B., 'Non-market values in internal market legislation', in: Nic Schuibne (Ed.), *Regulating the Internal Market* (Cheltenham, Edward Elgar, 2006), 69-70. This seems also to have been the Commission's point of view, when it stated that it would consider proposing a directive depending on progress made at the intergovernmental level: COM(88) 640 final, *supra* note 22, 34.

[32] Dublin Convention, *OJ* 1997, C254/1.

[33] COM(93) 684 final, Commission Proposal for (I) a decision, based on Article K3 of the TEU establishing the Convention on the crossing of the external frontiers of the Member States, (II) a Regulation, based on Article 100C of the TEC determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.

[34] Qualified majority, unless otherwise provided.

[35] Most importantly the adoption of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, *OJ* 1992, L302/1. See also the list of measures at the end of SEC(92) 877 final, *supra* note 17, 14-15.

It is important to note three things in relation to the amended draft. First of all, the draft Convention still contained a direct link between the territorial scope of application of the right of free movement for persons and territorial external borders of the EC Member States. The definition of external borders in the Draft Convention refers only to the EU Member States, not the EEA members. Second, with the deletion of articles on the crossing of goods, the exclusive focus on the free movement of persons was born. Third, the Draft Convention did not itself require the abolition of internal border controls. Rather it was a preliminary step towards such abolition.[36]

The Council did not reach agreement on the Decision on the External Frontiers Convention. This was partly due to the continuing disagreement over the status of Gibraltar, but also on the role of the European Court of Justice,[37] the connected decision of a common visa policy under Article 100c EC and related conventions: "[e]nhanced legal competence has proved to be similarly ineffective in the face of political opposition in related areas."[38]

In 1993 the Parliament brought an action against the Commission for failing to make the required proposals for the implementation of the free movement of persons across *internal* borders.[39] To avoid condemnation the Commission came forward with three proposals which were however never adopted.[40]

Meanwhile, the question as regards the scope and effect of Article 14 EC continued to stir up debate. The British Government renewed its claim that the declaration attached to the SEA was sufficient to justify the retention of internal border controls, which triggered the response by the Commission that it would use its legal powers to achieve a border free Europe.[41] Martin Bangemann, Internal Market Commissioner at the time, suggested the "waving" of a closed passport at internal border controls. The "Bangemann wave" represented a compromise aimed to facilitate as much as possible the exercise of the right of free movement of EU citizens in the face of continuing border controls.[42]

In 1997, a Dutch Euro-parliamentarian refused to show his passport upon arrival at Rotterdam airport - at the time serving exclusively destinations within the EU - arguing that with the expiry of the 31 December 1992 deadline, Article 7a TEC (now Article 14 EC) and 8a TEC (now Article 18 EC) had direct effect. Through the preliminary ruling procedure, the

[36] Guild, E., *Immigration Law in the European Community* (The Hague, Kluwer Law International, 2001), 226.
[37] Article K. 3 TEU provided for the possibility of jurisdiction of the ECJ over Third Pillar Conventions.
[38] Anderson, M. *et al*., *Policing the European Union* (Oxford, Clarendon Press, 1995), 143.
[39] Case C-445/93, *Parliament v Commission*, *OJ* 1994, C1/12.
[40] COM(95) 346-348 final, COM(95)347 amended by COM(97) 106 final.
[41] *Ibid*, 122.
[42] Spencer, M., *States of Injustice: A Guide to Human Rights and Civil Liberties in the European Union* (London, Pluto Press, 1995), 52.

case arrived before the ECJ.[43] The intervening Member States all concurred with the Commission that specific Community measures at the external borders would be necessary before internal border checks could be lifted in order to avoid the possibility of a Member State being faced with an unwanted TCN entering via another Member State.[44] In addition, the UK reiterated that in its view, even if the Court were to accept the direct effect of Article 8a, border checks would continue to be permitted since only persons having the nationality of a Member State have a right of entry into a Member State.[45]

The Court did not reply directly to the UK's argument. Instead, it held that the Treaty provisions in question could not be accorded direct effect, since they presupposed the adoption of implementing legislation.[46] The ECJ endorsed the view that - *in the absence of rules on control at the external borders, including conditions of access, visas and asylum* - the exercise of the right of free movement presupposes that the person concerned can proof that s/he has the nationality of a Member State.[47] In this judgment we therefore see the judicial endorsement of the view that controls at the external borders of the Community formed the necessary prerequisite for the establishment of the internal market.

It is important to realise that this case was decided in the autumn of 1999, that is after the entry into force of the Amsterdam Treaty, which had brought about a political compromise over the lifting of internal border controls and had expanded the jurisdiction of the Court over migration, borders and visas.[48] As Guild remarks the judgment is therefore perfectly understandable from a political point of view, although it should be regretted that it denied the right to move freely throughout the entire EU territory which the SEA had arguably conferred upon those present within EU territory.[49]

4. The Schengen Agreements

In parallel with the preparations for the completion of the single market, economic pressures, not least from the transport industry, pushed a limited number of Member States to enter into

[43] Case C-378/97, *Wijsenbeek* [1999] ECR I-6207.
[44] *Ibid.*, para. 28.
[45] *Ibid.*, para. 37.
[46] *Ibid.*, para. 40. Interestingly the Court did not refer to another declaration on Article 8a, stating that the date of 31 December 1992 did not create an automatic legal effect.
[47] *Ibid.*, para. 42.
[48] See *infra* section 5.
[49] Guild, E., *supra* note 36, 233.

negotiations to remove obstacles to cross-border trade.[50] On 13 July 1984 France and Germany signed the Saarbrucken Convention, an initiative of former German chancellor Kohl aimed at making border controls more flexible. The Benelux countries, which had already eliminated checks at their internal borders[51] entered into negotiations with the French and German Governments, resulting in the Schengen Agreement of 14 June 1985.[52] The Schengen Agreement formed the legal framework - under public international law - for the abolition of border controls between these Member States. The abolition of border checks was to be achieved by 1 January 1990.[53]

This 1990 deadline was not met, partly because implementing measures were not in place on time and partly because of the uncertainties surrounding German reunification at that time. On 19 June 1990 the Schengen Contracting Parties complemented the Schengen Agreement with the Schengen Implementation Convention (CISA). The CISA set out detailed rules on the controls at the common external borders of the participating states, police co-operation. Importantly it introduced a common visa regime for periods not exceeding three months and provisions on responsibility in matters of asylum.[54] Moreover, it provided for the establishment of the Schengen Information System (SIS), a data system shared by the Schengen signatories, providing data on persons or objects, such as people against whom an arrest warrant had been issued or stolen vehicles as recorded by the participant countries.[55]

The CISA clearly stated that controls at the external borders were to be carried out within the scope of national powers and national law, yet in accordance with uniform principles and taking into account the interest of all Contracting Parties.[56] Each Contracting Party remained responsible for the control and surveillance of its respective part of the

[50] Bigo, D., *Police en Reseaux : l'expérience européenne* (Paris, Presses de Sciences-Po, 1996), 114.
[51] On the basis of the 1960 Convention Concerning the Transfer of Entry and Exit Controls to the External Frontiers of the Benelux Territory.
[52] Note that this is the very same day the European Commission published its White Paper on Completing the Internal Market, *supra* note 10.
[53] Article 17 read in conjunction with Article 30 of the Schengen Agreement.
[54] The provisions on asylum have been superseded by the 1990 Dublin Convention, *supra* note 32, which has been incorporated in EU law as Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003, L50/1 (hereinafter: Dublin II Regulation).
[55] Title IV, CISA. A forerunner of this system was foreseen by the - never adopted - Convention on a European Information System, which is referred to in Article 13(2) of the Draft External Frontier Convention, *supra* note 33.
[56] Article 6, CISA, currently Article 15(1), Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006, L105/1 (hereinafter: SBC).

external borders.[57] The CISA entered into force between the five original signatories on 1 September 1993, but was not applied until 26 March 1995.

The CISA provided in Article 134 that it would apply only in so far as it is compatible with Community law. As both Bigo and Guild point out, the primacy accorded to Community law, in particular Article 14 EC, was never used to impede the Schengen system.[58] Rather it was given legitimacy as an enhanced cooperation *avant la lettre* and described as a laboratory for future European integration.[59] The Commission in its 1988 Communication stated that it in no way wished to slow down progress where progress could be made.[60] The Commission was from an early stage involved in the negotiations in order to ensure conformity with Community law.

Title V of the CISA dealt with the checks at the internal borders on goods. Unlike cooperation on the entry of TCNs, the Schengen Contracting Parties could not establish a single customs regime amongst themselves without encroaching upon the Communities exclusive competences in this field. Rather the provisions of Title V reduce checks on good carried by travellers to the lowest level possible, urge the Contracting Parties to have formalities such as customs clearance take place within the country and to facilitate and harmonise formalities governing the movement of goods across external borders within the framework of the Executive Committee, the EC and other international forums. Since the establishment of the internal market these provisions have become largely redundant in relation to the Member States, but they remain a part of the Schengen *acquis* and their application is specifically excluded in the Schengen Association Agreements with third countries.[61]

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[57] This remains the case also after the integration of the Schengen *acquis* into the EU legal order, discussed below. See for instance recital 4, Regulation Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L349/1.

[58] Guild. E., *supra* note 31, 13 and Bigo, D., 'Frontier Controls in the European Union: Who is in Control?', in: Bigo, D. and Guild, E. (Eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Aldershot, Ashgate, 2005), 66. Many scholars are however of the opinion that partial agreements, *i.e.* agreements concluded outside the EU's institutional framework between less than all of its Member States, remain possible. See e.g. De Witte, B., 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in: De Witte, B. *et al.* (Eds.), *The Many Faces of Differentiation in EU Law* (Antwerp, Intersentia, 2001). In my opinion Article 43 EU, stating that Member States *may* have recourse to enhanced cooperation, does not exclude partial agreements. One could argue that the principle of loyal cooperation requires Member States to make a genuine attempt to explore the options of enhanced cooperation first before leaving the EU framework. The logic of Article 43a EU inserted by the Treaty of Nice seems to support this argument. If enhanced cooperation is only to be undertaken as a last resort, this *a fortiori* applies to intergovernmental cooperation.

[59] Monar, J., ''The Area of Freedom, Security and Justice: Institutional and Substantial Dynamics in the perspective of the European Union', *Collegium* 22 (December 2001), 13.

[60] COM(88) 640, *supra* note 16, 4.

[61] See Chapter IV.

5. Careful Communitarisation

The Third Pillar as instituted by the Maastricht Treaty had considerable institutional and legal weaknesses, which manifested themselves in the slow progress made since its entry into force. The failure to adopt the External Frontiers Convention forms a case in point. Rather than adopting binding instruments, the failure within the Council to reach consensus led to the adoption of *soft law* measures such as resolutions and recommendations.[62] The serious limitations on the powers of the European Parliament and the ECJ tainted the Third Pillar with a lack of transparency and democratic and judicial accountability. From the same perspective, the Schengen Agreements, were even more questionable. These agreements were implemented through decisions by the Executive Committee, consisting of Member States' Representatives, which were not published and not subject to judicial review.

Consensus amongst Member States and EU institutions about the failure of the Third Pillar did not however mean there was a consensus on the solution.[63] The Amsterdam Treaty not only included important changes to the structure of cooperation in JHA, but also contained a substantial opt-in for the UK and Ireland and confirmed the Danish opt-out.[64] The Amsterdam Treaty transferred asylum, immigration and other policies related to the free movement of persons to the EC Treaty, to be dealt with under a new Title IV and reformed the Third Pillar covering the remaining police and judicial cooperation. JHA policies were united in Article 2 EU under a single objective, that of creating an Area of Freedom, Security and Justice "in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime," linking once more, but now explicitly in the EC Treaty, free movement with compensatory measures including controls at the external borders.[65]

The same link is found in Article 61(a) EC, obliging the Council to adopt within a five year period, measures to ensure the free movement of persons in accordance with Article 14 EC, in conjunction with directly related flanking measures with respect to external border controls. Article 62(2)(a) gave the Council the power to adopt measures on the crossing of the

[62] O'Keeffe, *supra* note 28, 894.
[63] Stetter, S., 'Regulating migration: authority delegation in justice and home affairs', 7 *JEPP* 1 (2000), 93.
[64] These will be discussed in the next chapter.
[65] Is has however been noted that, unlike the Single Market Objective or the EMU, the AFSJ lacks clear definition: Walker, N., 'In search of the Area of Freedom, Security and Justice: A constitutional Odyssey', in: Walker, N. (Ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), 5.

external borders of the Member States, establishing standards and procedures to be followed by Member States in carrying out checks on persons at such borders. Article 63(3)(b) formed the legal basis for measures on illegal immigration and illegal residence, including repatriation of illegal residents. Article 64(2) EC allowed the Council, acting by qualified majority on a proposal from the Commission, to take emergency measures in the event of a sudden inflow of nationals of third countries in one of the Member States. Article 66 conferred upon the Council the power to take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by Title IV, as well as between those departments and the Commission.

Although the Treaty of Amsterdam conferred important powers for the management of the external borders on the EU, this transfer of powers has not been exclusive, in the sense of representing a complete transfer of competences from the Member States to the Community; these powers are held concurrently with the Member States. Shared competence may become exclusive where the EC has enacted legislation and thereby preempted the powers of the Member States.[66]

The extension of the EU's powers in the areas covered by the Schengen Agreements, in combination with the opt-outs granted to a number of Member States, enabled the adoption of a protocol to the Amsterdam Treaty bringing the cooperation under the Schengen Conventions within the institutional and legal framework of the European Union.[67] In two decisions based on Article 2 of the Schengen Protocol, the Council identified the Schengen *acquis* and assigned a legal basis to the various parts of that very *acquis*.[68] Rules relating to visas, migration and asylum, including those on the crossing of external borders, were brought under the new Title IV EC, whilst the provisions for mutual legal assistance in criminal matters were moved to the Third Pillar.[69] The larger part of the Schengen provisions on external borders were assigned to either Article 62 or 66 EC as regards legal basis.[70]

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[66] In how far this has been the case will be discussed in Chapter VII.

[67] Article 5(1) of the Schengen Protocol states that proposals and initiatives that build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaty.

[68] Council Decision 1999/435/EC concerning the definition of the Schengen *acquis*, *OJ* 1999, L176/1 and Council Decision 1999/436/EC determining the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, *OJ* 1999, L176/17.

[69] Den Boer, M., 'Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization', 3 *MJ* 4 (1997), 313.

[70] No agreement was reached on the legal basis for the SIS and consequently it was brought under the Third Pillar, on the basis of Article 2, fourth paragraph, of the Schengen Protocol.

The incorporation of the Schengen provisions introduced into EC law the distinction between internal and external borders taken from the Schengen Convention and the CISA.[71] Article 1 CISA defined internal borders as:

> the common land borders of the Contracting Parties, their airports for internal flights and their sea ports for regular ferry connections exclusively from or to other ports within the territories of the Contracting Parties and not calling at any ports outside those territories

External borders were defined as:

> the Contracting Parties' land and sea borders and their airports and sea ports, provided that they are not internal borders.[72]

As can be seen from the above definition, the Schengen external border is not just a line, but comprises a whole "network of ports of entry."[73] It is interesting to note the negative definition of external borders as not being internal, emphasising that the external borders are not a closed list.[74]

It is imperative to realise that due to the opt-out and opt-ins of several Member States, the external borders of the Schengen area, that is the area without border controls in which there is free movement for all, do not coincide with the "external borders" of the area in which there is the free movement for persons having this right under Community law. The notion of external borders of the Member States in the Maastricht Treaty, is thus a different and broader one from that of the Treaty of Amsterdam.

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[71] Crowley rightly points out the contradiction between Article 14 EC abolishing internal borders and Article 62(1) EC which states that the Council shall take measures to ensure the absence of any control of persons when crossing internal borders: Crowley, J., 'Locating Europe', in: Groenendijk, K., *et al.* (Eds.), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 38.

[72] This definition is taken over in Article 2(1) and (2), SBC.

[73] Salter, M., 'Passports, Mobility and Security: How smart can the border be?', 5 *ISP* 1 (2004), 80.

[74] Note the similar negative definition in the Draft External Frontiers Convention, *supra* note 33:

> *External Frontiers mean:*
> *(i) a Member State' s land frontier which is not contiguous with a frontier of another Member State, and maritime frontier;*
> *(ii) airport and seaport, except where they are considered to be internal frontiers for purposes of instruments enacted under the Treaty establishing the European Community.*

The 1988 Commission Communication, still referred to the question of the extent to which ports and airports were to be considered internal borders as contentious, this was probably resolved in the absence of the UK participation in the Schengen *acquis*.

The importance of the definition of the Schengen external border was shown in Case C-170/96.[75] Here, the Commission brought an action against the Council in which it argued that Joint Action 96/197/JHA on Air Transit Visas (ATV) should have been adopted under the First Pillar on the basis of the former Article 100c TEC.[76] The ECJ however ruled that the ATV did not involve the crossing of the EU's legal external border since it required the holders to stay in the transit area of the airport.[77]

Article 67 of Title IV provided for a transitional period of five years in which the Commission shared its right of initiative with the Member States. This period ended on 1 May 2004, although the Commission is required to take into account requests of the Member States to submit proposals to the Council. During the transitional period decision making in the Council was unanimous, with a right of consultation for Parliament. On the basis of the second indent of Article 68(2) EC, the Council extended, as of 1 January 2005, the co-decision procedure to Article 62(2)(a) EC.[78]

With the Treaty of Amsterdam, the K.4 Committee was renamed Article 36 Committee and its competences were limited to the areas remaining under the Third Pillar.[79] Instead of applying the usual working structure in Community areas of competence (working groups - Coreper - Council), the Member States set up a Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), essentially for the same reason the K.4 Committee had been instituted, namely limiting the influence of the ambassadors in Coreper.[80] As a result, the areas of the First Pillar continued to be subject to a four level working structure.[81]

Article 68 EC restricts the role of the Court under Title IV EC. Only national courts from which no further judicial remedy is possible have a duty to refer preliminary questions

[75] Case C-170/96, *Commission v. Council* ("Air Transit Visas") [1998] ECR I-3655.
[76] Joint Action 96/197/JHA on airport transit arrangements, *OJ* 1996, L63/8.
[77] Case C-170/96, *supra* note 75, paras 23-24. Note that this is a legal fiction which would not be accepted for the purpose of protection under the ECHR: *Amuur v France* (Appl. No. 19776/92), ECtHR, 25 June 1996, para. 52.
[78] Council Decision 2004/927/EC providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, *OJ* 2004, L396/45. In accordance with Protocol (No 35) on Article 67, the Council acted since 1 May 2004 by qualified majority, on a proposal from the Commission and after consulting the European Parliament, in order to adopt the measures referred to in Article 66.
[79] Monar, J., *supra* note 30, 135.
[80] *Ibid*.
[81] Under the Third Pillar there is a Treaty legal basis for the Article 36 Committee, the SCIFA however was set up under the Council's powers of internal organisation.

to the ECJ.[82] Article 68(2) EC further excludes the Court's jurisdiction from measures taken under Article 62(1) EC - the legal basis for measures related to the abolition of internal border controls - in as far as they relate to the maintenance of law and order and the safeguarding of internal security.[83]

The most likely interpretation of Article 68(2) EC is that it forms the Community equivalent of Article 35(5) EU, aimed to prevent the ECJ from pronouncing itself on the legality and proportionality of Member States law enforcement authorities *or* the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Peers argues that Article 68(2) does not prevent the Court from ruling on the interpretation or validity of EU acts in a preliminary ruling procedure.[84] If for instance such a ruling led to the conclusion that a certain police action was not in conformity with an EU act, it would depend on the power of the national judiciary under domestic law to sanction the law enforcement agencies.

Interestingly, this article also does not seem to prevent the ECJ from pronouncing itself on the correct interpretation of measures based upon Article 62(2)(a) EC relating to the external borders. Therefore, in principle the Court would not be barred from ruling whether or not a border guard's action was in conformity with the SBC. This would however seem to run against the logic of Article 64(1) EC which emphasises that the Member States are ultimately responsible for the safeguarding of their internal security. It seems to have been the Member State's intention, expressed in Articles 68(2) EC and 35(5) EU, to exclude the judicial review of Member States action also in this policy field. Powers of physical coercion remain tightly in the hands of the Member States. Controls at the Schengen external borders are carried out in accordance with the Schengen Borders Code (SBC) and national legislation. For instance, Article 4 SBC states that border guards shall ensure that a TCN who has been refused entry does not enter the territory of the Member State concerned. One can imagine that this may on occasion require a degree of coercion. The conditions for the use of this force are however prescribed in national law and the authorities permitted to use force are designated exclusively by national law.[85]

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[82] Article 68(1) EC. In cases in which a Member State has made a declaration according to Article 35(3)(b) EU, this means that in practice jurisdiction of the ECJ may be more restricted under Title IV EC than under the Third Pillar of the EU.

[83] A similar exception is contained in Article 2(1) of the Schengen Protocol.

[84] Peers, S., *supra* note 30, 47. This seems to be confirmed in Case C-150/05, *Van Straaten* [2006] ECR I-9327, para. 37 regarding an entry made in the SIS.

[85] Recital 12 and Article 15(1), SBC.

The second indent of Article 67(2) EC required the Council to take a decision at the end of a five year transitional period following the entry into force of the Treaty of Amsterdam with a view to adapting Article 68 EC. Notwithstanding that this period ended on 1 May 2004, the Council has not yet taken such a decision. The Commission did come forward with a Communication to "contribute to the adaptation" of Article 68 EC, annexing a draft Council Decision which would cease to apply the Article in its entirety.[86]

The limited rights of the European Parliament under the consultation procedure, although not alien to other parts of the EC Treaty, combined with the shared right of initiative during the transitional period, the restricted jurisdiction of the Court and the four-level working structure in the Council all show that the process of communitarisation or more generally that of supra-nationalisation has been gradual.

6. The Reform Treaty: Final Step in the Communitarisation of JHA

In what respect will the Lisbon Treaty change the legal framework outlined above? Most importantly it will merge the First and Third Pillar, making co-decision the standard legislative procedure for the whole AFSJ and as such completing the process of communitarisation of competences in JHA. Article 71 TFEU provides for the setting up of a Standing Committee on Internal Security (COSI), replacing the CATS, which should "ensure that operational cooperation on internal security is promoted and strengthened."[87]

In Article 3(2) TEU, we find the overall AFSJ objective in its original formulation. The first chapter of Title V TFEU, lays down the general provisions applicable to the AFSJ. In Article 67(2) TFEU, the link between the absence of internal border controls and the policy on the external borders is much less prominent than under Article 61(a) EC, rather attributing importance to both independently. Article 67(3) TFEU states that the Union shall strive for a

[86] COM(2006) 346 final. The Commission argues here that the principle of effective judicial protection is "one of the fundamental rights that help to define the very concept of the rule of law." In view of this sweeping statement, one may wonder why the Commission did not call upon the Council to act earlier, a first step in a possible procedure against the Council before the ECJ for failure to act on the basis of Article 232 EC. Also the ECJ has defined the principle of effective judicial protection as general principle of Community law stemming from the constitutional traditions common to the Member States, see Case 222/84, *Johnston* [1986] ECR 1651, paras 18 and 19 and recently Case C-432/05, *Unibet* [2007] ECR I-2271, para. 37.

[87] In the European Convention it was proposed to merge the various Council working groups dealing with internal security and remove the CATS from the legislative process: Final Report of Working Group X on Freedom, Security and Justice, European Convention, CONV 426/02, 16. Therefore the COSI will be discussed in Chapter VIII.

"a high level of security" amongst others through the "coordination and cooperation between police and judicial authorities and other competent authorities".

The current Title IV EC is only amended to a very limited extent and is clearly recognisable as such in Chapter 2 of Title V TFEU. Article 74 TFEU almost literally retakes Article 66 EC on administrative cooperation. The legal basis for measures on the external borders is however refined. Article 77(2)(b) refers to measures "concerning the checks to which persons crossing external borders are subject", while Article 77(2)(d) provides that the Union has competence to "any measure necessary for the gradual establishment of an integrated management system for external borders."

It is interesting that the Treaty introduces the concept of integrated management system for external borders. This notion has so far been defined only in the Council Conclusions on Integrated Border Management of December 2006, which suggested it was a very broad concept, including not only border control, but also the fight against crime and inter-agency cooperation.[88] It is yet to be seen to what extent Article 77(2)(d) TFEU will allow the Community legislator to include under this legal basis aspect on criminal law and police cooperation relating to the external borders.[89] However, it could be argued that this would still have to be done under the chapter on police cooperation. Another question is whether this article would in the long run allow for the conferral of executive powers on EU officials.[90] Recalling Weber's definition of the state, the use of force by EU officials would considerably change the nature of the European Union and the way in which it relates to its Member States.[91]

Under the Constitutional Treaty the ECJ would have immediately been given full jurisdiction over this entire policy area. The Lisbon Treaty delays this for a maximum of five years for those policy areas that currently fall under the Third Pillar. In addition the special protocols on the position of the UK, Ireland and Denmark are now extended to cover the whole of the AFSJ.[92] The possibility for the Court to review the legality and proportionality of

[88] Results of the JHA Council, Brussels, 4-5 December 2006 (Council Document 15801/06), 26.
[89] EU Counter-Terrorism Coordinator De Kerchove has called it "absurd" that under the current legal framework Frontex cannot deal with security related threats other than irregular migration: 'Europe is kwetsbaar voor Terrorisme' (*De Standaard*, 11 September 2008).
[90] In Chapter IX we will discuss how EC legislation has regulated the exercise of executive powers by national border guards from one Member State when deployed in the framework of joint operational activity in another Member State.
[91] Weber, M., *supra* note 5.
[92] Under the transitional arrangements the UK may, at the latest six months before the expiry of the transitional period, notify the Council that it will not accept the powers of the institutions for measures falling under the old Third Pillar, which will then cease to apply to the UK, after which the UK may however decide to opt-in again to these measures under the Protocols applicable to the UK on the Schengen *acquis* and Title IV TFEU.

operations carried out by a Member State's police or other law enforcement agencies or of the exercise of a Member State's duty to maintain law and order and safeguard internal security remains excluded in Article 276 FEU. However, this article applies only to the chapters on judicial cooperation in criminal matters and police cooperation.

Monar has argued that the restriction of the Court's jurisdiction regarding the legality and proportionality of the actions of nation law enforcement agencies is in line with the principle of respect for the essential state functions in maintaining law and order and safeguarding internal security. This principle was laid down in Article I-5(1) CT and will, after the Lisbon Treaty, be found in Article 4(2) EU and Article 72 TFEU.[93] Others have argued in the same vein that this clause reflects the position of the Member State governments as ultimate providers of security for citizens.[94]

However, national competences may have been extended on the basis of European legislation.[95] The House of Lords in its report on the future role of the ECJ rightly considered this restriction on the Court's jurisdiction as unjustified. The Lords argued that the ECJ should be entitled to assess the validity of Member States' enforcement authorities when implementing Union legislation against the norms contained in the Charter of Fundamental Rights.[96]

7. Re-instating the Internal Borders

Although Article 2(1) of the CISA provided that all internal borders could be crossed at any point without any checks being carried out, the second paragraph of the same Article stipulated that national border checks could be re-instated where public policy or national security so required. When immediate action would be required this could be done without prior consultation of the other Contracting Parties. In December 1995 the Schengen Executive Committee took a Decision on the procedure for applying Article 2(2),[97] necessitated by the

[93] Monar, J., 'A new "Area of Freedom, Security and Justice" for the Enlarged EU? The results of the European Convention', in: Henderson, K., *The Area of Freedom, Security and Justice in the Enlarged Europe* (Hampshire, Palgrave MacMillan, 2005), 129.
[94] Elise Consortium, 'Security Issues and critical institutional balances in the on-going IGC': http://www.eliseconsortium.org/article.php3?id_article=146.
[95] See for instance Framework Decision 2002/584/JHA, on the European arrest warrant and the surrender procedures between Member States, *OJ* 2002, L190/1.
[96] House of Lords Select Committee on the EU, 'The Future Role of the European Court of Justice' (HL Paper 47, Session 2003-04, 6th Report, 15 March 2004), 37.
[97] Decision of the Executive Committee on the Procedure for applying Article 2(2) of the Convention implementing the Schengen Agreement, SCH/Com-ex (95) 20, rev. 2.

invocation of the article by France in order to justify its refusal to lift controls at its borders in July 1995.[98] It emphasized that "the reinstatement of border controls must remain a matter of exception."

With the implementation of the Schengen *acquis* in the EU legal order, Article 2(2) CISA was assigned Article 62(1) EC as legal basis. It was thus communitarised. Yet, Article 2(1) of the Protocol on the incorporation of Schengen in the EU states that "in any event, the Court of Justice shall have no jurisdiction on measures or decisions relating to the maintenance of law and order and the safeguarding of internal security", which seems to refer to Article 68(2) EC. In addition the Decision determining the legal basis for each of the provisions of the Schengen *acquis* explicitly mentions Article 64(1) EC, which stipulates that Title IV EC shall not affect the exercise of the Member States' responsibilities in matters of law and order and internal security.

Chapter II of the SBC has replaced Article 2(2) CISA as well as the Decision on the procedure for application thereof, taking over most of its substantive content. A significant improvement made is the duty to inform the European Parliament and the public on a re-instatement of border controls.[99] The EP rapporteur had requested the Council to adjust the power of the Court as provided for in Art. 67(2) 2nd indent EC in order to give the ECJ the competence to rule on the legality of a Member State's decision to re-instate controls at its internal border, but no amendments to this effect were included.[100]

In practice the reinstatement of internal border controls means that to all means and effects the internal border of the Member State in question becomes an external border. Article 28 of the SBC stipulates that where border controls at internal borders are reintroduced, the relevant provisions of the Title II of the SBC apply *mutatis mutandis.*

Borders have been mainly been re-instated around major (political) events, rather than for the fight against criminal activities.[101] The re-instatement of borders has also been used to create a sense of security and protection.[102] The French decision to re-install border checks

[98] This refusal was initially motivated by discontent over the Netherlands policy on soft drugs.
[99] Article 27 and 30 respectively, SBC. This duty is however limited by overriding security concerns (article 29) and Member States are, when requested, to respect the confidentiality of information provided in relation to the reintroduction of checks at the internal border.
[100] EP Report on the proposal for a regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (A6-0188/2005), 64.
[101] Groenendijk, K., 'Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?', 10 *ELJ* 2 (2004), 168.
[102] *Ibid*., 170.

after the London bombings in July 2005 is a clear example of this.[103] If the reinstatement of controls at the internal borders is to remain the exception, for the time being, it is the Member States that decide on this exception. Although one cannot fully draw the comparison with Schmitt's state of exception, in that the Member States do not step outside the rule of law, but rather substitute their own rules for those of the EU, it is nevertheless useful to point out that in this respect Member States have retained sovereignty over their borders.[104] The Lisbon Treaty seems to change this, in that it would extend the jurisdiction of the ECJ to cover all of the current Title IV EC. Nevertheless, one may expect the Court to take a "hands-off" approach if a case were to be brought before it.

Article 64(2) which allows the Council to take emergency measures in a situation characterised by the "sudden inflow of nationals of third countries" is significant in that it allows the Council to establish that there is an emergency situation. It is however important to realise that such measures are to be decided upon by unanimity, which makes it not only politically, but also legally impossible for such measures not to be agreed upon without the consent of the Member State in question. The Lisbon Treaty maintains this unanimity.

More generally, EU Member States remain competent to declare a state of emergency. This is also evidenced by Article 297 EC which refers to measures a Member State may be required to take in the event of serious internal disturbances affecting the maintenance of law and order, war or similar circumstances. Although the ECJ has jurisdiction to rule on such measures under Article 298 EC, AG Jacobs noted in his opinion in Case C-120/94 that if a Member State considers that the attitude of a third state threatens its vital interests, its territorial integrity, or its very existence, it is for the Member State and not for the Court to determine a response to that perceived threat, and there are no judicial criteria by which the appropriateness of such a response can be measured.[105] One could envisage that such a situation would also include the suspension of the Community rules relating to the management of the external borders.

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[103] Council Document 6055/06. The Schengen Border Code does not however contain the possibility for Member States to simultaneously re-install border controls in the event of a major terrorist threat, as did the Commission proposal, Article 24, COM(2004) 391 final.

[104] Schmitt, C., *supra* note 6. See on Carl Schmitt's theory on emergency: Gross, O, 'The normless and exceptionless exception: Carl Schmitt's theory of emergency powers and the "norm exception" dichotomoy', 21 *Cardozo L Rev* (2000), 1825-1868.

[105] Opinion of Advocate General Jacobs in Case C-120/94, delivered 6 April 1995, *Commission v. Greece* [1996] ECR I-1513, para. 65. The ECJ never ruled on the case as it was withdrawn from the register on request of the Commission.

8. Conclusion

It was not until the Treaty of Amsterdam that the Community acquired powers for the regulation of the external borders through the transfer of policies from the Third Pillar to the First Pillar and the transformation of the Schengen *acquis* into European law. This communitarisation of competences has however been a gradual process, which for the broader cooperation in JHA will find its conclusion with the entry into force of the Treaty of Lisbon, albeit again subject to a transitional period, as well as old and new opt-outs for a small number of Member States.

The transfer of competences in the area of the management of the external borders from the national to the supranational level, first within the framework of Schengen and later within the EU, appears to have been less contentious than other areas of JHA. Already under the Maastricht Treaty it was one of the areas subject to a so-called *passarelle* clause and unlike the closely related task of police cooperation it was communitarised by the Treaty of Amsterdam. One explanation for this is the link that was created from the end of the 1980s onwards between the reinforcement of the external borders and the establishment of the internal market project. Diverging opinions as to the nature and scope of Article 14 EC and in particular the meaning of "an area without internal frontiers" only found their solution in the Amsterdam Treaty. The ECJ then endorsed this *modus vivendi* by denying Article 14 EC direct effect.

The Schengen Agreements brought about an effective disjunction between the external borders and the territorial scope of free movement rights. This could have been, but was not, remedied by the External Frontiers Convention. As a result, the major distinction in external borders is that between the EU external borders which are coincident with the Schengen external border, e.g. the Polish-Ukrainian border, and the EU external borders which are not, e.g. the British or Irish borders. Whilst at the Schengen external borders, border procedures are regulated by the SBC, at the non Schengen EU external borders it is the national law of the Member State in question that determines the procedures to be followed, albeit within the limits imposed by EU law.[106]

[106] These limits are set by the EU rules on the right of free movement of persons, see Chapter VI.

Groenendijk and Guild state that with the entry into force of the Treaty of Amsterdam the definition of EU borders has become a matter of competence of the Community.[107] This statement is true if one reads borders here in its broader, functional definition, being the place at which persons may face controls which may prevent them from continuing their journey towards a Member State of destination. The actual territorial border, which retains its importance in both international and Community law, is still defined by reference to the Member States' territory. The new Article 69(4) TFEU underlines once more that the powers currently contained in Article 62 EC leave the competence of Member States as regards the geographical demarcation of their borders, in accordance with international law, unaffected.[108]

Even Schengen Member States retain an important competence over the management of their borders, internal and external, in that they remain the ultimate providers of national internal security. They remain competent to reinstate border checks where they consider this to be necessary for reasons of public policy or national security. Moreover, one could argue with Carl Schmidt that while EU Member States retain the power to declare "a state of emergency", which could include the re-instatement of border checks and a suspension of the Schengen rules, they remain sovereign. In addition, although the Community has acquired important powers for the regulation of the management of the external borders, coercive powers remain firmly in the hands of national authorities, who act upon the basis of powers conferred upon them by national law.

[107] Groenendijk, K. and Guild, E., 'In search of Europe's borders: Article 62 EC, Visas and European Community Law', in: Groenendijk, K., *et al.* (Eds), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 1.

[108] This was also stipulated in the 9th recital to Decision 2004/927/EC, *supra* note 78. Of course, Member States will always be under the obligation to comply with EU law in exercising this competence. See in this respect Case C-146/89, *Commission v. UK* [1991] ECR I-3533 on the extension by the UK of its territorial sea and the effects thereof on the activities of fishermen from other Member States.

IV. Locating Europe's External Borders

1. Introduction

The incorporation of the Schengen *acquis* into the EU's legal order introduced the definition of external borders in Community law. However, this definition only defines the external borders of the Schengen area, in which not all Member States participate. In the previous chapter it was therefore concluded that rather than speaking of one set of borders one should speak of two: the external borders of the Schengen area and the external borders of the area in which the Community rules on the free movement of persons apply. This chapter will examine the geographical location of these two sets of borders, which coincide only where the external borders of the area of free movement of persons coincide with the external borders of the Schengen area.[1]

Considering that since the Treaty of Amsterdam the Schengen *acquis* has formed an integral part of the Community *acquis*, our point of departure will be Article 229 EC, which determines the territorial scope of the EC Treaty. Determining the territorial scope of the Community rules of free movement and the Schengen *acquis* is necessary not because an interest is taken in the internal application of these legal regimes, but because they determine the geographical location of the borders thereof.

It will however soon become clear that Article 229 EC can only function as a *prima facie* definition of these borders. Not only does a number of Member States not participate in the Schengen *acquis*, various third countries have associated themselves with the Community rules on the free movement of persons and the rules of the Schengen *acquis*. This chapter will therefore examine the various ways in which the territorial scope of these specific parts of the Treaty - the Community right of free movement of persons and the Schengen *acquis* - has been either limited or extended. It will examine in detail the modalities of these countries' (non) participation.

Finally, the situation at the borders of a number of Member States requires specific attention. Although the Member States are ultimately responsible for the geographical

[1] In accordance with Article 49 EU the Union is open to accession by any European state respecting its principles. This chapter will not engage in the broader discussion on a *finalité politique*, nor try to define the notion of "European state." It is therefore a sketch in time, subject to future enlargements.

demarcation of their borders, outstanding conflicts may have implications for the management of the external borders and beyond.

2. The Territorial Scope of the Community Right of Free Movement

2.1 Article 229 EC: The Territorial Scope of the EC Treaty

Article 229(1) EC enumerates the 27 Member States to which the Treaty applies. In principle, the treaty applies to the whole territory of each Member State as "primarily defined by reference to [their] constitution."[2] The free movement of persons is one of the four fundamental freedoms and there are no territorial derogations other than the limitations in territorial scope contained in Article 299 EC. Article 299 EC itself does not refer to the territory of the Member States, nor can a similar article be found in the EU Treaty. The successor of Article 355 TFEU, in combination with Article 52 TEU, leaves no doubt that the article defines the territorial scope of what currently are the EC and EU Treaty.

The Member States' territory includes the French Overseas Departments,[3] the Azores, Madeira and the Canary Islands. The territories have been given the status of "outermost region" in Article 299(2) EC, meaning that in the application of the Treaty special account shall be taken of their structural social and economic situation.

Under Article 299(3) EC, the Treaty does not apply - with the exception of Part Four on association - to the *non-European* countries and territories which are listed in Annex II of the Treaty and have special relations with Denmark (Greenland), France (French Overseas Territories), the Netherlands (the Dutch Antilles) and the United Kingdom. It does not apply at all to those countries and territories with special relations to the UK that are not listed in Annex II. Greenland joined the EC as an integral part of Denmark in 1973. However, after the establishment of home rule in 1979, the population voted against continued EC membership in a referendum. The EC Treaty was amended in 1984 and Greenland received the status of overseas territory.[4]

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[2] Case 148/77, *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787, para. 10.
[3] The French Overseas Departments are: Guadeloupe, Reunion, Guyana, Martinique.
[4] Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, *OJ* 1985, L29/1.

The Lisbon Treaty adds in Article 355(6) TFEU, stating that the European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission.[5]

Article 299(4) EC stipulates that the Treaty shall apply to the *European* territories for whose external relations a Member State is responsible. This means that the EC Treaty applies to Gibraltar, which is a British Overseas Territory, falling under UK sovereignty, without being part of the UK.[6]

Under Article 299(5) EC, the Treaty applies to the Åland Islands (Finland) in accordance with the provisions set out in Protocol No 2 to the Act of Accession of Finland. The protocol recognizes the special status of Åland under international law and allows for restrictions on the freedom of services and establishment for natural persons.[7]

Under Article 299(6) EC, the Treaty does not apply to the Danish Faeroe Islands. It does apply to the Channel Islands and the Isle of Man, but only to the extent necessary to ensure implementation of the arrangements for these Islands set out in the Act of Accession of the UK.[8] Originally the Treaty did not apply to the UK sovereign bases on Cyprus.[9] This has changed with the accession of Cyprus to the EU. Protocol No 3 to the Act of Accession of 2003 amended Article 299(6)(b) EC so as to make parts of EC law applicable, notably the customs and common commercial policy.[10] The Community *acquis* on the right of free movement was not extended to the Sovereign Base Areas (SBAs). However, there has been a right of entry from and into the SBAs, without border controls, under a 1960 Agreement in

[5] A declaration adopted at the time of the signature of the Constitutional Treaty, which first introduced this clause, made it clear that it was to allow for the transformation of Mayotte into an Outermost region, and possibly of the islands of Saint Martin and Saint Barthélémy, belonging to the Region of Guadeloupe, into OCTs. See also: French Senate, Rapport d'Information No 329, Session Ordinaire 2004-2005 (Annex to the Minutes of the Session of 10 May 2005). In Réunion, it was however wrongly interpreted to mean that the island could be made an OCT against its will, resulting in a negative vote on the Constitutional Treaty: Ziller, J., 'The European Union and the Territorial Scope of European Territories', 38 *VUWLR* 1 (2007), 62.

[6] In Article 28 of the Act of Accession of the UK (*OJ* 1972, L73/14) Gibraltar was excluded from the Customs Area, the Common Agricultural Policy and the VAT regime.

[7] The islands are an autonomous, neutral part of Finland, see the Act on the Autonomy of Åland**,** 16 August 1991/1144). Protocol No 2 to the Act of Accession of Finland, *OJ* 1994, C241/9.

[8] Most importantly the rules on customs matters and quantitative restrictions apply to both the Channel Islands and the Island of Man, Article 1, Protocol No 3 on the Channel Islands and the Isle of Man to the Act of Accession of the UK, *OJ* 1972, L73/164.

[9] When Cyprus gained independence in 1960, the UK retained full sovereignty over these bases as "Sovereign Base Areas", which totals 3 per cent of the island. See: Ahnish, F., *The international law of maritime boundaries and the practice of states in the Mediterranean Sea* (Oxford, Clarendon Press, 1993), 256 ff.

[10] Articles 1 and 2, Protocol No 3 to the Act of Accession of Cyprus on the Sovereign Base Areas of the UK in Cyprus, *OJ* 2003, L236/940.

which the UK unilaterally declared not to create customs ports or other frontier barriers between the SBA and Cyprus.[11] The Protocol provides in Article 5 that Cyprus is not required to carry out checks on persons crossing their land and sea boundaries with the SBA and any Community restrictions on the crossing of external borders shall not apply in relation to such persons. Under Article 5(2) of the Protocol, the UK is responsible for controlling the external borders of the SBA, the definition of which however excludes the land and sea borders with Cyprus.[12]

An interesting observation is made by Ziller who argues that there could be a "contradiction between the geographical scope of application and the personal scope of application of EC law in the case of Danish, French and Dutch OCTs."[13] He argues that the limitation of the territorial scope of EC law involves limitations for the free movement of persons, while the territorial origin of citizens of a Member State on the territory of the state should be of no consequence according to the constitutional principles of non-discrimination common to the Members States. The right of free movement is however linked to EU citizenship, which is determined on the basis of Article 17 EU by Member State nationality. Where the free movement of persons is territorially applicable, it can therefore be exercised by an EU citizen independent of his/her territorial origin. A good example here is the island of Saint Martin. The French part of the island forms part of the EU, the Dutch part does not. The Dutch (and consequently EU) citizens of the island can nevertheless use their free movement rights in order to cross the border to the French part of the island.

2.2 Temporary Derogations from the Community Right of Free Movement

Treaties of Accession may contain temporary exceptions on the provisions on the free movement of workers. Greece was given full free movement of workers only six years after joining the EC in 1981, while Portugal and Spain obtained the full freedom of movement of its workers seven years after their accession in 1986.[14] On the basis of the Acts of Accession of 2003 and 2005, temporary derogations apply to the "new" Member States, with the

[11] Appendix O to the Treaty concerning the Establishment of the Republic of Cyprus: *Declaration of Her Majesty's Government Regarding the Administration of the Sovereign Base Areas.* See in more detail: Skoutaris, N., *The Cyprus issue: The four freedoms in a (Member) State of siege. The application of the acquis communautaire in the areas not under the effective control of the Republic of Cyprus* (PhD thesis, EUI, 2009).
[12] Part Four, Article 1(a), Protocol No 3, *supra* note 10.
[13] Ziller, J., *supra* note 5, 56.
[14] Articles 44-48, Act of Accession of Greece, *OJ* 1979, L291/17 and Articles 55-60, Act of Accession of Spain and Portugal, *OJ* 1985, L302/23.

exception of Malta and Cyprus (EU-8).[15] Article 24 of the Act of Accession of 2003 stipulates the temporary provisions in connection with the individual country annexes V to XIV. These provisions allowed the "old" Member States (EU-15) to apply their national immigration laws or previously concluded bilateral agreements regulating access to the labour market for a two year period, thus derogating from the free movement of workers. After this period they would have to notify the Commission if they intended to extend application of national rules for three more years.[16] A further application of national rules for another two more years would be possible in case of serious disturbances of the labour market or the threat thereof.[17] This so-called "2+3+2 formula" is applied to Romania and Bulgaria.[18]

A standstill clause in paragraph 2(14) of the CEEC country annexes and paragraph 1(14) of the annexes for Bulgaria and Romania, guarantees that national measures shall not be more restrictive than those prevailing on the date of signature of the Treaty of Accession. Moreover, in the application of the principle of Community preference for access to the labour market, an "old" Member State must give precedence to nationals from the new Member States over third country nationals. Ott has argued that it is unclear which consequences the standstill clause has on the rights of family members, who under the Europe Agreements had a right of entry and residence once the worker had established himself legally in one of the Member States.[19] The EU-8 country annexes merely mention in paragraph 2(9) that the EU-15 may derogate, to the extent necessary, from the provisions of Directive 68/360/EEC[20] insofar as it may not be dissociated from Regulation (EEC) No 1612/68 on the free movement of workers.[21] However, since the rights of family members are dependent on

[15] Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic, *OJ* 2003, L236/33 and the Act of Accession of Bulgaria and Romania, *OJ* 2005, L157/203.
[16] The Commission in COM(2006) 48 final argued that the 2004 enlargement had been an economic success and had not upset the labour market balance in any of the member states, nevertheless a number of Member States maintained its restrictions.
[17] Only two Member States, Germany and Austria, have invoked this provision.
[18] Article 23 read in conjunction with Annex VI and VI of the Act of Accession of Bulgaria and Romania, *OJ* 2005, L157/203. See for an overview of the restrictions still in place: http://ec.europa.eu/social/main.jsp?catId=466&langId=en.
[19] Ott, A., 'The "Principle" of Differentiation in an Enlarged European Union – Unity in Diversity?', in: Inglis, K., and Ott, A. (Eds), *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Groningen, Europa Law Publishing, 2005), 120.
[20] Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *OJ* Sp. Ed. 1968, L257/13, 485, repealed by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* 2004, L158/77.
[21] Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, *OJ* Spec. Ed. 1968, L257/2, 475.

those of the worker, the same logic should apply to family members, namely that their situation after enlargement should not be allowed to be more restrictive than before.[22]

The transitional arrangements do not apply to the freedom to provide services or the freedom of establishment, with its corollary rights of free movement. The Posted Workers Directive, which deals with the freedom to provide services, is not subject to the transitional arrangements.[23] Moreover, as will be discussed in detail in the following chapter, the right to enter another Member State can be invoked on the basis of a valid passport or identity card alone. Therefore the limitations on the free movement of workers impact on the right to work and the right of residence of EU-8 citizens, rather than on the actual possibility for a citizen from the EU-8 to enter or exit a Member State.

Although it is not the first time an enlargement has been accompanied by a transitional regime for the acceding Member States, earlier derogations were put in place before the concept of European citizen was inserted in the Treaties. In view of the ECJ's characterization of European citizenship as the "fundamental status of nationals of the Member States," it comes as little surprise that no transitional arrangements apply to Articles 12 and 18 EC.[24] Since, the nationals of the EU-8 are European citizens from the moment of accession, they have not merely the possibility, but also the right of entry, exit and residence for up to three months under Directive 2004/38/EC.[25] Moreover, Article 40 of both the Act of Accession of 2003 and the Act of Accession of 2005 explicitly state that national rules imposed by the acceding Member States during the transitional period shall not lead to border controls between Member States and therefore hamper the proper functioning of the internal market. The conclusion must be that the borders of a Member State cannot function as a site of control for the national provisions that remain in force during the transitional period.

[22] See also Case 77/82, *Peskeloglou* [1983] ECR-1085, para.12 in which the Court held that the transitional provision in the Greek Act of Accession constituted a derogation of the free movement of workers and therefore had to be interpreted restrictively.
[23] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, *OJ* 1997, L18/1. Note that Germany and Austria are allowed to apply restrictions on the cross-border provision of services in certain sensitive sectors as provided by para. 2(13) of the EU-8 annexes to the Accession Treaty 2003, as well para. 1(13) of the Country Annexes to the Accession Treaty 2005.
[24] See for instance Case C-184/99, *Grzelczyk* [2001] ECR I-6193, para. 31 and Case C-138/02, *Collins* [2004] ECR I-2703, para. 61.
[25] Directive 2004/38/EC, *supra* note 20.

2.3 Extension of the Free Movement of Persons to the EFTA countries

In the previous chapter it was briefly noted that the freedom of movement of persons has been extended to the EEA countries, necessitating amendments to the draft External Frontiers Convention. These countries all belong to the European Free Trade Association (EFTA). The EFTA was founded in 1960 by the Stockholm Convention by a number of non EC members as an economic counterbalance to the more politically driven EEC.[26] Many of the EFTA Members, such as Austria, Finland and Sweden, have joined the EU over time. The EFTA currently comprises Liechtenstein, Norway, Iceland and Switzerland.

Between the individual EFTA countries and the EC a system of free trade agreements was put into place. In April 1984, at a ministerial meeting between the EFTA countries and the EC on the occasion of the final implementation of these free trade agreements, the ministers issued the Luxembourg Declaration, which stressed the importance of further cooperation and called for the creation of a "dynamic and homogeneous European Economic Space".[27] It was a good five years later that, on the initiative of Commission President Jacques Delors, the idea was relaunched and formal negotiations were opened.[28] The Community, the Member States and the EFTA countries, concluded the European Economic Area (EEA) Agreement in May 1992.[29] It allowed the EFTA countries to participate in the single market, including the free movement of persons, without joining the EU.[30] The Annexes to the EEA agreement list the provisions of Community legislation that apply to the EEA countries.

After a negative vote in a referendum on the EEA agreement in Switzerland, the remaining EFTA countries joined the EEA Agreement.[31] It entered into force on 1 January 1994. Switzerland however pursued its aim of obtaining access to the internal market through the negotiation of bilateral sector agreements. An agreement on the free movement of persons

[26] See: http://secretariat.efta.int/Web/Info_Kit/History. The founding members were: Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the UK. Finland joined in 1961, Iceland in 1970, and Liechtenstein in 1991.
[27] Ministerial Meeting Between EFTA Countries and the EC and its Member States', *EFTA Bull*. 2/84, 6 (1984).
[28] Brandtner, B., 'The 'Drama' of the EEA: Comments on Opinions 1/91 and 1/92, 2 *EJIL* 3 (1992), 302.
[29] Commission and Council Decision 94/1/EC, ECSC on the conclusion of the Agreement on the EEA between the European Communities, their Member States and Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland, *OJ* 1994, L1/1.
[30] See Part III of the EEA Agreement on the free movement of persons, services and establishment, in particular on the free movement of workers Article 28(5) read in conjunction with Annex V.
[31] Commission and Council Decision 94/2/EC, ECSC on the conclusion of the Protocol adjusting the Agreement on the EEA between the European Communities, their Member States and Austria, Finland, Iceland, Liechtenstein, Norway and Sweden, *OJ* 1994, L1/571.

was signed in 1999 and entered into force 1 June 2002.[32] Its initial duration was seven years, after a positive referendum on 8 February 2009 the agreement was renewed indefinitely.[33]

The Agreement does not simply copy the Community provisions on free movement as does the EEA Agreement.[34] It does not make explicit reference to the EC legislation on the free movement of persons, but rephrases and restructures the rights contained therein in Annex I. The right of entry is laid down in Article 3 of the Agreement, to be read together with Article 1 of Annex I. The Agreement also lacks an institutional framework, such as the EEA agreement, with a Court and Surveillance Authority.

It is important to note that the EEA Agreement explicitly provides that a country becoming a member of the EU shall also apply to become party to the EEA Agreement.[35] Article 6(5) of the 2003 Act of Accession, and Article 6(6) of the 2005 Act of Accession reiterate this for the accession countries. The Swiss agreement, following standard treaty practice, is silent on enlargement.

Although the EEA and the EC-Switzerland agreement are mixed agreements, *i.e.* covering Community and Member State competences and therefore signed by both, the Acts of Accession stipulate that accession of the new Member States to such agreements is to be agreed by the conclusion of a protocol between the Council, acting unanimously on behalf of the Member States, and the third country or countries concerned. A 2004 EEA Enlargement Agreement was signed by the EC, the Member States and the EEA countries, on 3 July 2003 and entered into force provisionally as of 1 May 2004, the date of enlargement.[36] The 2007 EEA Enlargement Agreement was signed on 25 July 2007 and is currently in the process of ratification. Pending its ratification it is applied provisionally as of 1 August 2007.[37]

Two protocols to the Agreement on the free movement of persons with Switzerland have extended the rights contained in the Agreement to the Member States that acceded in 2004 and 2007 respectively.[38] In a referendum on 25 September 2005, the Swiss voters,

[32] Agreement between the EC and its Member States, of the one part, and Switzerland, of the other, on the free movement of persons, *OJ* 2002, L114/6.
[33] Article 25(2), *ibid.*
[34] Peers, S., 'The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis', 2 *EJML* (2000), 128.
[35] Article 128, EEA Agreement.
[36] 2004 EEA Enlargement Agreement, *OJ* 2004, L130/3.
[37] 2007 EEA Enlargement Agreement, *OJ* 2007, L221/1.
[38] Protocol to the Agreement between the Community and its Member States, of the one part, and Switzerland, of the other, on the free movement of persons regarding the participation, as contracting parties, of [EU-10] pursuant to their Accession to the EU, *OJ* 2006 L89/30 and the Protocol to the Agreement between the Community and its Member States, of the one part, and Switzerland, of the other, on the free movement of

approved of the extension of the agreements to the EU-10. On 8 February 2009, they approved the extension to Romania and Bulgaria, in the same referendum that ended the sunset clause of Article 25(2) of the Agreement. Both in the case of the agreements on the EEA enlargement and the extension of the scope of the Agreement on the free movement of persons with Switzerland, transitional arrangements similar to or the same as those found in the Acts of Accession have been put in place.

The relations *amongst* the EFTA countries are governed by the revised EFTA Convention , which was signed in Vaduz on 21 June 2001 and mirrors the sectoral agreements between Switzerland and the EU. It entered into force on 1 June 2002, the same day as the Switzerland-EU agreements.

The EEA agreement and the EC-Switzerland Agreement have enlarged the area of free movement of persons with the territory of the third countries parties to these agreements, placing some of the borders of the area of free movement beyond actual EC territory. The Community legislator may however adopt new EC legislation or amend existing rules, and the ECJ may give an interpretation, all of which raise the questions as to how to ensure the uniform application of the *acquis* also in this wider area of free movement of persons.

The EEA Agreement establishes an EEA Joint Committee, consisting of the Contracting Parties' representatives, which in order to "guarantee legal security and homogeneity of the EEA", must reach agreement on amendments to the EEA Annexes necessitated by new Community legislation. In case of disagreement, the Agreement ultimately provides for a suspension of the affected part, however maintaining all rights that may have already arisen under the Agreement for individuals.[39]

The Joint Committee further keeps under constant review the development of the case law of the ECJ and the EFTA Court.[40] If the Joint Committee does not succeed in preserving the homogeneous interpretation of the Agreement within two months after a difference in the case law of the two Courts has been brought before it, it may agree to bring the case before the ECJ.[41] If disagreement persists for six months and the parties have not agreed to bring the

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persons, regarding the participation of the Bulgaria and Romania pursuant to their accession to the EU, *OJ* 2009, L124/53.

[39] Article 102, EEA Agreement.

[40] Article 105(2), EEA Agreement. The draft EEA agreement envisaged a single EEA court, but in Opinion 1/91, the ECJ ruled that such judicial mechanism would infringe Article 164 EEC of the Treaty: Opinion 1/91 on the draft EEA Agreement [1991] ECR I-6079, para. 3.

[41] Article 111(3), EEA Agreement.

case before the ECJ, they may either resort to safeguard measures[42] or apply the procedure that may eventually lead to a suspension of the relevant part of the Agreement.[43]

The EC-Switzerland Agreement provides for a Joint Committee consisting of Contracting Parties' representatives, but otherwise lacks an institutional structure like that of the EEA. It contains much less elaborate provisions to ensure the homogenous application of the Agreement. Article 16(1) provides that parties must "take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community *to which reference is made* are applied in relations between them." Article 16(2) states that in relation to "concepts of Community law, account shall be taken of the relevant case law of the Court of Justice prior to the date of signature." Article 17 states that Contracting Parties shall inform each other through the Joint Committee, when initiating legislation in a field covered by the Agreement and in case of a change in the case law. The Joint Committee is limited to an "exchange of views" in such cases. Presumably in case of serious disagreement jeopardizing the homogenous implementation of the Agreement, a revision under Article 18 would be required.

3. Schengenland: The Territorial Scope of the Schengen *Acquis*

3.1. The Territorial Scope of the Schengen Agreements

Let us now turn to the second set of borders that we identified in the previous chapter, the Schengen borders. Prior to the Treaty of Amsterdam, which entered into force 1 May 1999, all Member States had acceded to the Schengen Conventions, with the exception of the UK and Ireland.[44] Neither of the Schengen Agreements contains an explicit clause determining the territorial scope of the Agreements. Instead, reference is made throughout the text to the territories of the Contracting states. Article 138 of the Schengen Implementation Convention did state that it applied only to the European territory of France and the Netherlands. A French Declaration to the Treaty of Amsterdam repeated once more the exclusion of the non-

[42] Article 111(3) read in conjunction with Article 113, EEA Agreement.
[43] Article 111(3) read in conjunction with Article 102, EEA Agreement.
[44] Italy (signed 27 November 1990), Spain and Portugal (signed 25 June 1991), Greece (signed 6 November 1992) and Denmark, Finland and Sweden (signed 19 December 1996), all are included in the Schengen *acquis* as published in the *OJ* 2000, L 239/1.

European territory of the French state. In practice there are no border checks with Monaco, San Marino and Vatican City, whose borders can therefore be considered *de facto* external borders. Border checks do however exist in the case of Andorra.

A number of the association agreements through which the Member States joined the Schengen cooperation contain special arrangements for specific parts of their territory. Article 1(e) of the "Declaration on the towns of Ceuta and Melilla" to the 1991 Accession Agreement of Spain states that border checks on persons *departing* from these Spanish enclaves situated in North-Africa, would remain in force, independent of whether their destination lies in mainland Spain or any of the other Contracting Parties. The enclaves nevertheless have to be considered Schengen territory. The Schengen *acquis* fully applies in Ceuta and Melilla and both towns are mentioned as authorised border crossing points in the forerunner to the Schengen Borders Code (SBC).[45]

A Joint Declaration to the 1992 Accession Agreement of Greece states that the contracting parties shall take into account the special religious and constitutional status of Mount Athos, a semi-autonomous monastic republic from which women are banned.

Article 5(1) of the 1996 Accession Agreement of Denmark states that the agreement shall not apply to the Faeroe Islands and Greenland. Article 5(2) however states that because of the cooperation within the Nordic Passport Union between Iceland, Norway, Sweden, Finland and Denmark, persons travelling between these parts of Denmark and any of the other Schengen countries shall not be subject to border checks. In practice therefore the borders of Greenland and the Faroe Islands constitute Schengen external borders.[46] A joint statement in the Final Act to the Accession Agreement provides that the agreement would only enter into force once it was established that rules necessary for the implementation of effective control and surveillance measures at the external borders of the Faeroe Islands and Greenland had been put into place.[47]

[45] Common Manual, *OJ* 2002, C313/133. Thanks to Paula García Andrade for pointing this out. The Schengen Borders Code in Article 36, specifically mentions that it shall not affect the special arrangements for Ceuta and Melilla, which would have been superfluous had they not been Schengen territory.
[46] Kjaer, K., 'How Many Borders in the EU', in: Groenendijk, K.., *et al.* (Eds), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 180.
[47] See on the practical difficulties at national level: Kjaer, K., *ibid.*, 184.

3.2 United Kingdom and Ireland

The Protocol to the Treaty of Amsterdam on the application of certain aspects of Article 7a of EC Treaty to the UK and Ireland brought a political solution to the disagreement over the interpretation of an "area without frontiers" in Article 14 EC. The protocol seems to imply that this must be understood as an area without internal border controls, stating that Article 14 *notwithstanding*, the UK and Ireland will be allowed to exercise such controls at its internal borders as it may consider it necessary to verify the right to enter under Community law and to determine whether or not to grant other persons permission to enter. References to the UK include those European territories for whose external relations the United Kingdom is responsible.

The protocol also endorses the Common Travel Area between Ireland and the UK. The Common Travel Area finds its legal basis in unpublished administrative agreements from 1922 and 1952.[48] As Ryan notes it formed a pragmatic response to the practical and political difficulties linked to the management of the UK-Ireland land border.[49] Maintaining this passport free travel area with the UK, formed the main reason for Ireland not to join the Schengen cooperation. However, this reason may now lose force as the Common Travel Area seems to be coming to an end.[50] The UK Government has proposed to introduce checks on passengers and their documents on sea and air routes to and from Ireland. It did not however intend to introduce fixed immigration controls at the land border.

The position of the UK and Ireland in relation to the Schengen *acquis* has been regulated in the Protocol integrating the Schengen *acquis* into the framework of the European Union (Schengen Protocol). A separate "Protocol on the position of the UK and Ireland" regulates the position of these Member States as regards the broader cooperation in justice and home affairs under Title IV EC (Title IV Protocol).

The Schengen Protocol provides in Article 4 that the UK and Ireland can "at any time request to take part in some or all of the provisions of the Schengen *acquis*," depending on a unanimous vote in the Council. On the basis of this article, the Council has adopted two decisions, one for the UK and one for Ireland respectively, outlining the specific parts of the

[48] See Ryan, B., 'The Common Travel Area between Britain and Ireland', 64 *MLR* 6 (2001), 855-874.
[49] *Ibid*., 870.
[50] 'New border control will abolish free movement between UK and Ireland' (*The Times*, 25 October 2007) and 'Britain and Ireland agree to tighten border check' (*The Times*, 25 July 2008). The UK Border Agency's Consultation Paper, 'Strengthening the Common Travel Area', was published on 24 July 2008. The UK Government's response on 15 January 2009.

Schengen *acquis* in which these countries had requested to participate and in which they were allowed to do so by the Council.[51]

Article 5 of the Schengen Protocol states that for "proposals and initiatives to build upon the Schengen *acquis*" the relevant provisions of the Treaties apply. This means that for the adoption of measures that develop parts of the Schengen *acquis*, the decision-making procedure is determined by the legal basis assigned to the part of the Schengen *acquis* in question.[52] Moreover, since the UK and Ireland are in principle non-participants in the Schengen *acquis*, the provisions on enhanced (or closer) cooperation apply.[53] For this reason, the second subparagraph continues that in the context of measures developing the Schengen *acquis*, "where either Ireland or the United Kingdom or both have not notified the President of the Council in writing within a reasonable period that they wish to take part," the authorization for enhanced cooperation is deemed to be granted to the Member States that fully apply the Schengen *acquis* and "to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question."

The Title IV Protocol establishes in Article 1 that the UK and Ireland are not bound by measures adopted under Title IV EC. Article 3 of the same protocol makes it possible for either the UK or Ireland to notify the President of the Council within three months after a proposal has been presented to the Council on the basis of Title IV that it wishes to participate in the adoption thereof, "whereupon it shall be entitled to do so." Under this protocol the UK and Ireland seem to have a generous opt-in to measures that have a legal basis in Title IV EC. However, Article 7 of the same Title IV Protocol makes it clear that this provision is without prejudice to the Schengen Protocol. Article 5 of the Schengen Protocol must therefore be considered a the *lex specialis* to Article 3 of the Title IV Protocol. The latter applies only to legislation with a legal basis in Title IV which does not fall within the notion of "proposals and initiatives to build upon the Schengen *acquis*" in the meaning of the Schengen Protocol.

In Cases C-77/05 and C-137/05, the UK contested its exclusion by the Council from two regulations which where wholly or in part based on Article 62(2)(a) EC, the legal basis in

[51] See Council Decision 2000/365/EC concerning the request of the UK to take part in some of the provisions of the Schengen acquis, *OJ* 2000, L 131/43 and Council Decision 2002/192/EC concerning Ireland's request to take part in some of the provisions of the Schengen acquis, *OJ* 2002, L 64/20.
[52] See Council Decision 1999/436/EC determining the legal basis for each of the provisions or decisions which constitute the Schengen acquis, *OJ* 1999, L176/17.
[53] Article 43 EU.

Title IV for measures on the crossing of the external borders of the Member States.[54] The Council argued that they formed a development of that part of the Schengen *acquis* for which the Council had not granted the UK previous permission to participate. Decision 2000/365/EC, the decision taken on the basis of Article 4 of the Schengen Protocol which determines the areas of the Schengen *acquis* in which the UK participates, does not include the rules relating to the crossing of the external borders of the Schengen area.[55] The UK had however argued that application of Article 5 of the Schengen Protocol, allowing them to participate in the development of Schengen developing measures, was independent of prior application of Article 4 ("independence thesis"). It based its argument in part on Declaration No 46 on Article 5 attached to the Schengen Protocol. This declaration states that Member States shall make every effort to facilitate action amongst all Member States in the domains of the Schengen *acquis, in particular* (though not exclusively) where Ireland and the UK have opted-in to parts of that *acquis*.

The Court held that the classification of a measure as developing the Schengen *acquis* must, like the choice of legal basis, be based on objective factors which are amenable to judicial review in particular the aim and content of the act, as both the choice of legal basis and the classification of an act as developing the Schengen *acquis* determine the procedure for its adoption. [56] It further ruled that the reference to "proposals and initiatives to build upon the Schengen *acquis*" refers to measures building upon the Schengen *acquis* within the meaning of Article 4. Since these measures must be consistent with the provisions they implement, they presuppose the acceptance of both those provisions and the principles on which those provisions are based.[57] The purpose of Article 5 is to allow the UK and Ireland to refrain from participating in the development of the parts of the Schengen *acquis* to which they had opted-in under Article 4. According to the Court this interpretation of Articles 4 and 5 ensures the effet utile of these provisions, by allowing on the one hand the UK and Ireland to opt-in to

[54] Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L 349/1 and Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States, *OJ* 2004, L 385/375. For the more specific content of these regulations and particulars of these cases see Chapter VIII.
[55] Council Decision 2000/365/EC, *supra* note 51.
[56] Case C-77/05, *UK v Council* [2007] ECR I-1145, para. 75-77 and Case C-137/05, *UK v Council* [2007] ECR I-11593, para. 54-56. See the ECJ's established case law in Case C-300/89, *Commission* v *Council* ("Titanium dioxide") [1991] ECR I-2867. See for further discussion: Rijpma, J., 'Annotation to Cases C-77/05 and C-137/05', 45 *CMLRev* 3 (2008). See for a very critical note: Chalmers, D., 'Cut off from Europe: the Fog surrounding Luxembourg', 33 *ELRev* 2 (2008), 135-136.
[57] Case C-77/05, *ibid.*, para. 68 and Case C-137/05, *ibid*, para. 50.

parts of the Schengen *acquis*, whilst on the other hand overcoming any possible reluctance these countries may have to do so for fear of being bound by a further development of the *acquis*.[58]

The UK had submitted in the alternative that Article 5 would apply only to "Schengen-integral measures." Schengen integral measures would then be those measures that by their nature would require prior acceptance of the underlying *acquis*, such as amendments to the *acquis* itself. The article would however not apply to Schengen-related measures which, although linked to the development of the *acquis*, were capable of autonomous application and as such did not pose a threat to the integrity of that very *acquis*. This argument was accepted by the Advocate General in her opinions.[59] The Court however ruled that this distinction, even if the UK had argued that it was merely an interpretative tool, lacked a basis in the Treaties or secondary Community law.[60]

The Court instead gave a very broad interpretation of the phrase "proposals and initiatives to build upon the Schengen *acquis*," to the effect that it covers any measure that may, judged by its content and purpose, render more effective parts of the Schengen *acquis*.[61] Under this construction very few measures that have their legal basis in Title IV EC will fail to qualify as a Schengen developing measure and consequently the scope of the Title IV protocol has been drastically reduced.

Arguably, the Court should have paid more attention to the question of whether the UK's participation in the contested regulations would have impeded the "practical operability" of the Schengen *acquis*.[62] Article 5 of the Schengen Protocol, as amended by the Lisbon Treaty, introduces this criterion in relation to the UK and Ireland's participation in the Schengen *acquis*. The Court could have taken the fact that a measure is capable of autonomous application into account as an element in determining whether a measure constitutes a proposal or initiative to build upon the Schengen *acquis*.

Despite the fact that the Court interpreted the purpose of Article 4 as to ensure the maximum participation of Member States in the Schengen *acquis*, its actual purpose seems to be to provide the Schengen Member States with a veto power as regards the participation of

[58] Case C-77/05, *ibid*., para. 66.
[59] Opinions of AG Trstenjak, delivered on 10 July 2007. The AG here followed the view expressed by Thym, D., *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Baden-Baden, Nomos Verlag, 2004), 98.
[60] Case C-77/05, *supra* note 56, para. 73 and Case C-137/05, *supra* note 56, para. 52.
[61] Case C-77/05, *ibid*, para. 85 and Case C-137/05, *ibid*, para. 65.
[62] See the new Article 5(3) of the Schengen Protocol.

the UK and Ireland in parts of the Schengen *acquis*.[63] Here one could argue that the intergovernmental origins of the Schengen cooperation shine through. One could imagine a Member State like Spain to be highly unwilling to give up such power, bearing in mind the continuing disagreement with the UK over the sovereignty of Gibraltar.[64]

Considering that it is unlikely in the foreseeable future that the UK will subscribe to the abolition of controls at its border as a means of facilitating the free movement of persons, the Court may well have blocked the UK's participation in parts of the Schengen *acquis* indefinitely.[65] However, the Court's judgments may in the long run contribute to the UK and Ireland's integration in the Schengen *acquis* by confronting these Member States with undesirable consequences of their non-participation in parts thereof. In view of the extensive opt-outs negotiated in the Lisbon Treaty this should be assessed positively.

3.3 Denmark

Denmark's reservation on participation in the field of asylum and migration dates back to the Edinburgh Decision attached to the Maastricht Treaty which was the result of a negative referendum on the Maastricht Treaty earlier that year. A "Protocol on the position of Denmark" to the Treaty of Amsterdam regulates the position of this Member State as regards Title IV EC. It clearly states in Article 1 that Denmark does not take part in the adoption of measures under this title.

Article 3 of the Schengen Protocol makes it clear that Denmark's rights and obligations under the Schengen *acquis* remain unchanged, *i.e.* on the basis of obligations under international law. Hence, the Danish territory, with the exceptions as laid down in the CISA, continued to form part of the borderless Schengen Area. The legal basis for this then seems to be Article 3(1) of the Schengen Protocol, rather than the original Schengen Agreements, which would explain why the enlargement of the EU did not necessitate additional agreements under public international law with the acceding Member States. Where the Schengen area is however expanded through the association of third countries with the Schengen cooperation such additional agreements would be necessary.[66]

[63] Case C-77/05, *supra* note 56, para. 67.
[64] See section 4.3 below.
[65] Notice also that the Protocol on the application of certain aspects of Art. 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland has been maintained by the Treaty of Lisbon.
[66] Presumably however only in respect of those parts of the Schengen *acquis* that find their legal basis in Title IV EC. On a different interpretation of Article 3, second paragraph of the Schengen Protocol: Hanf, D., 'Flexibility

Regarding proposals building upon the Schengen *acquis* under the First Pillar, Denmark has the possibility to opt-in to these measures within six months.[67] Measures under Title IV EC which are not considered a development of the Schengen *acquis* are outside the scope of the possibility to opt-in.[68] Denmark could, of course, become affiliated to such measures on the basis of agreements under pubic international law.

Under the Lisbon Treaty the Protocol on Denmark would cover the whole area of freedom, security and justice (AFSJ), so including also the former Title VI EU on police and judicial cooperation. Article 8 of the Protocol provides however that Denmark can unilaterally amend the Protocol, bringing into effect Annex I to the Protocol, which would allow Denmark to opt-in, in a way similar to the UK and Ireland to measures developing the Schengen *acquis*.

3.4 Schengen Associated Countries

Notwithstanding its incorporation into EU law, a number of third countries have joined the Schengen area. It was noted above that the borders of the area of free movement in some instances are to be found outside EC territory. This also holds true for the external borders of the Schengen area in the case of the Schengen Associated Countries (SAC).

Norway and Iceland

At the same time at which Denmark, Finland and Sweden joined the Schengen Agreements, 19 December 1996, Norway and Iceland concluded a Cooperation Agreement with the Schengen Contracting Parties.[69] This agreement was essentially aimed to retain the arrangements in place for the movement of persons within the Nordic Passport Union. The free travel area between the Scandinavian countries was established in 1952 and abolished border controls with the 1957 Nordic Passport Control Agreement, effective as of 1 May

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Clauses in the Founding Treaties from Rome to Nice', in: De Witte, B. *et al.* (Eds), *The Many Faces of Differentiation in EU Law* (Antwerp, Intersentia, 2001), 18.

[67] Article 5, Protocol on the Position of Denmark.

[68] This could be an additional reason for which the Court decided to interpret broadly the notion of "proposals and initiatives to build upon the Schengen *acquis*. Denmark would have been excluded from opting into these measures had they been classified as not developing the Schengen *acquis*, while it does participate in the Schengen cooperation.

[69] Cooperation Agreement between [the] Contracting Parties to the Schengen Agreement and Schengen Convention and Iceland and Norway as regards the abolishment of control on persons at the common borders (translation), *Trb* 1997, 133.

1958.[70] Norway and Iceland participated in the Schengen Executive Committee, but did not have a vote.[71]

Article 6 of the Schengen Protocol stated that Norway and Iceland were to be associated with the implementation and development of the Schengen *acquis*. On 18 May 1999 both countries concluded an Agreement to this effect with the EU, which entered into force 26 June 2000.[72] Article 14 of the Agreement excludes Svalbard (Spitsbergen, Norway).[73] On 1 December 2000 the Council decided that, as from 25 March 2001, the Schengen *acquis* arrangements would apply in full to the five countries of the Nordic Passport Union, meaning that all controls were lifted on that date.[74] Since the EEA is however not a customs union, checks on goods, for instance against contraband, may still be carried out and involve checks on persons.[75]

The Agreement establishes a Mixed Committee, consisting of the representatives of the Contracting Parties, which discusses matters related to the Schengen *acquis* and the development thereof.[76] It is informed of any legislative proposal relevant to the agreement.[77] Council Decision 1999/437/EC determines in Article 1(a) that the provisions of the Schengen Association Agreement shall apply to proposals developing the rules on the crossing by persons of the external borders, including the rules on border controls.[78]

Although the Commission is held to consult with the experts of Norway and Iceland in the drafting phase, it is clearly stated that the adoption of new acts or measures is reserved to the competent institutions of the EU.[79] These acts must be implemented in the internal legal order of Norway and Iceland and will, unless stated otherwise, enter into force at the same

[70] 1952 Protocol concerning the abolition of passports for travel between Sweden, Denmark, Finland and Norway, *UNTS* 1954, 2655 and 1957 Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers (translation), *UNTS* 1959, 4660.
[71] Article 2(2), 1996 Cooperation Agreement, *supra* note 69.
[72] Agreement concluded by the Council and Iceland and Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, *OJ* 1999, L176/36 (hereinafter: 'Schengen Association Agreement NO/IS'). Since this agreement finds its legal basis directly in the Protocol there was no need to adopt separate Council decisions for those parts of the *acquis* falling under the First Pillar and those under the Third Pillar.
[73] See in more detail on the position of the five Nordic countries within the Schengen Framework: Kjaer, K., *supra* note 46, 169.
[74] Council Decision 2000/777/EC on the application of the Schengen acquis in Denmark, Finland and Sweden and in Iceland and Norway, *OJ* 2000, L309/24.
[75] Case E-2/97 *Maglite* [1997] EFTA Court Report 127, para. 25.
[76] Articles 3 and 4, Schengen Association Agreement NO/IS
[77] Article 5, *ibid*.
[78] Council Decision 1999/437/EC on certain arrangements for the application of the Agreement concluded by the Council of the EU and Iceland and Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, *OJ* 1999, L176/31.
[79] Articles 6 and 8(1), Schengen Association Agreement NO/IS.

time for all Contracting Parties.[80] Article 8(2) foresees in the procedure to be followed in case Norway or Iceland need to fulfil constitutional requirements before they can become binding.[81]

If either Iceland or Norway notifies the Commission that it will not implement an act in its internal legal order, the Agreement must be considered as terminated for the respective state, unless the Mixed Committee determines otherwise.[82] The Agreement stipulates that the acceptance of EU legislative measures developing the Schengen *acquis* creates rights and obligations not only between the Community and its Member States on the one hand and Norway and Iceland on the other, but also between Iceland and Norway themselves.[83] The fact that the agreement creates rights between states indicates that these rights are not directly conferred upon the EU/SAC citizen, but require implementation in the national legal order of Norway and Iceland.

The Mixed Committee closely monitors the development of the relevant case law of the ECJ and the competent courts of Iceland and Norway relating to the provisions of the Schengen *acquis*.[84] Iceland and Norway are entitled to submit statements and written observations in cases before the ECJ in prejudicial cases on questions concerning the Schengen *acquis*.[85] In case of a substantial difference in the case law or the application of the *acquis* by the national authorities, the Mixed Committee has two months to seek a way to ensure a uniform application and interpretation.[86] If is does not succeed in doing so, Article 11 determines that the Mixed Committee shall at ministerial level seek to settle to the dispute. If after a maximum of 120 days it has not succeeded in doing so, the agreement is to be considered terminated in relation to Norway or Iceland, depending on the country concerned.

More than with the EEA Agreement, the continuation of the Schengen Association Agreement is dependent on the unconditional acceptance of the Schengen *acquis*. This could be explained by the more limited scope of the Schengen *acquis*, but possibly also by the strong interest Norway and Iceland had in continuing the Nordic Passport Union as well as in participating in Schengen's flanking measures, such as access to the Schengen Information System (SIS).[87]

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[80] Article 8(1), *ibid*.
[81] In that case only Norway is held to apply the act provisionally, where possible: Article 8(2)(c), *ibid*.
[82] Article 8(4), *ibid*. This would have to imply a suspension of the Nordic Passport Union.
[83] Article 8(3), *ibid*.
[84] Article 9(1), *ibid*.
[85] Article 9(2), *ibid*.
[86] Article 10, *ibid*.
[87] This security based motivation will be discussed in more detail in Chapter VII.

Switzerland and Liechtenstein

Switzerland signed a Schengen Association Agreement with the EU on 26 October 2005, after the Swiss population had endorsed the Government's intention to adhere in a referendum on 5 June 2005.[88] On the basis of Article 14(2) parts of the agreement were applied on a provisional basis.[89] The Agreement is the first mixed pillar agreement, meaning it was concluded by both the EC and EU.[90] The agreement entered into force on 1 March 2008, controls at the land borders were lifted on 12 December 2008 and at air borders on 29 March 2009.[91] Like Norway and Iceland, Switzerland is not in a Customs Union with the Schengen Member states which means that checks on goods at the internal Schengen border remain possible.

The Agreement with Switzerland mirrors the Agreement between the EU and Norway and Iceland. It sets up a second Mixed Committee and provides for the same procedures to ensure the uniform application of the Schengen *acquis* and the eventual suspension of the agreement.[92] The only difference can be found in Article 7(2)(b) and flows from Switzerland's constitutional tradition of direct democracy. In case a positive vote in a referendum is required in order for an act to become binding, Switzerland will have two years to inform the Council on whether it will implement the act or not. Where no referendum is necessary, but can nevertheless be called, Switzerland will notify the Council after the expiry of the referendum deadline. From the moment of entry into force of the act until Switzerland makes its notification, it shall, where possible, implement the act provisionally. If this is not possible, causing a disruption to the Schengen cooperation, the EU and EC may take proportionate and appropriate measures against Switzerland ensuring the smooth operation of Agreements. Council Decision 1999/437/EC applies by analogy to Switzerland on the basis of the Council's Decision on the signature of the Schengen Association Agreement.[93]

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[88] Agreement between the EU, the EC and Switzerland on the association of Switzerland with the implementation, application and development of the Schengen acquis, *OJ* 2008, L53/52 (hereinafter: 'Schengen Association Agreement CH/LI')

[89] Articles 1, 3, 4, 5 and 6 and the first sentence of Article 7(2)(a); these articles however mainly concern the setting up and functioning of the Mixed Committee.

[90] Council Decisions 2004/849/EC (*sic*) (*OJ* 2004, L368/26) and 2004/861/EC (*OJ* 2004, L370/78) on the signing, on behalf of the EU and the EC respectively, of the agreement with Switzerland concerning the association with the implementation, application and development of the Schengen acquis.

[91] Article 15, Schengen Association Agreement CH/LI read in conjunction with Council Decision 2008/903/EC on the full application of the provisions of the Schengen acquis in Switzerland, *OJ* L327/15.

[92] In practice these two Mixed Committees meet as one, see the Joint Declaration on Joint Meetings of Mixed Committees attached to the Schengen Association Agreement CH/LI.

[93] Article 4(1), Council Decision 2004/860/EC on the signing, on behalf of the Community, and on the provisional application of certain provisions of the Agreement between the EU, the EC and Switzerland,

After the Swiss "yes" to Schengen, Liechtenstein also started negotiations on accession. Article 16 of the Agreement with Switzerland allowed Liechtenstein to join the agreement by means of a protocol, preventing the need to conclude a separate Agreement. On 28 February 2008 the Council adopted the decision on the signature of such protocol.[94] The protocol takes over *mutatis mutandis* the provisions of the Swiss Schengen Association Agreement.

Relations between the Schengen Associated Countries, with Denmark and with non-Schengen Member States

The Association Agreement with Norway and Iceland states that it replaces the previously existing Cooperation Agreement of 1996.[95] While the Protocol on the Position of Denmark in Article 2 provides that no provision of any international agreement concluded by the Community pursuant to Title IV EC can bind Denmark, this Member State does seem bound by the Association Agreement between the EC and Norway and Iceland, which confirms our interpretation that the Schengen Protocol forms the legal basis under public international law for Denmark's association to the Schengen *acquis*.[96]

The Association Agreement with Switzerland explicitly mentions that Switzerland should conclude separate international agreements with Denmark, as well as with Norway and Iceland in order to create rights and obligations between all associated partners applying the Schengen *acquis*.[97] Article 15(3) makes application of the Association Agreement, depending on the implementation of those agreements. Since the Schengen Association Agreements are

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concerning the Swiss association with the implementation, application and development of the Schengen acquis, *OJ* 2004, L370/78.

[94] Council Decision 2008/261/EC on the signature, on behalf of the EC, and on the provisional application of certain provisions of the Protocol between the EU, EC, Switzerland and Liechtenstein on the accession of Liechtenstein to the Agreement between the EU, EC and Switzerland on Switzerland's association with the implementation, application and development of the Schengen acquis, *OJ* 2008, L83/3. See for the text of the Protocol: Council Document 16462/06.

[95] Article 18, Schengen Association Agreement NO/IS.

[96] Council Decision 1999/439/EC on the conclusion of the Agreement with Iceland and Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, *OJ* 1999, L176/35 does not refer to any special position of Denmark. Article 6 of the Schengen Protocol, legal basis for the Agreement, refers back to the Member States mentioned in Article 1 of the Protocol which include Denmark.

[97] Article 13(1) and 13(2) respectively, Schengen Association Agreement CH/LI. See for the text of the Agreement between Switzerland, Iceland and Norway of 17 December 2004: http://www.admin.ch/ch/d/as/2008/529.pdf and for the text of the Agreement between Switzerland and Denmark of 28 April 2005, relating to that part of the Schengen *acquis* with a legal basis in Title IV EC: http://www.admin.ch/ch/d/sr/i3/0.360.314.1.de.pdf.

signed by the EC/EU only, successive enlargements of the EU have not necessitated agreements between the new Member States and the Schengen Associated Countries.[98]

In the case of Switzerland, which is not under an obligation in the agreement on free movement with the Community to enlarge the area of free movement in case of accession, this could lead to the awkward situation of a borderless area, without free movement rights.[99] Even if neither of the two Association Agreements explicitly links the lifting of the internal borders to the internal market, the official logic is still that a borderless area is to foster the free movement of persons.[100]

From a formalistic legal point of view the Schengen Agreement could remain in force. Switzerland would then have to interpret the reference to "persons enjoying the Community right of free movement" as including nationals of those new Member States.[101] Nevertheless, before the Swiss referendum on the extension of the free movement right to Bulgarian and Romanian citizens, JLS Commissioner Barrot was already quoted saying that a negative outcome would probably have to result in the interruption of Switzerland's presence in the Schengen area.[102]

On the basis of Article 6, second paragraph of the Schengen Protocol, the Council has concluded an agreement with Norway and Iceland, in order to establish the rights and obligations between the UK and Ireland on the one hand, and Iceland and Norway on the other, in domains of the Schengen *acquis* which apply to these States.[103] Although one would expect the necessity of a similar agreement between the UK/Ireland and Switzerland, this is not foreseen in the Association Agreement. Rather the preamble of the Association Agreement refers to the special position of the UK and Ireland, and it is stated in Article 15(1) that the UK and Ireland are involved in the Council Decision on whether Switzerland fulfils

[98] If a SAC were to disagree with an enlargement of the Schengen area, it could probably invoke the *clausula rebus sic stantibus* doctrine, which would however necessitate the termination of the Association Agreement.
[99] The reverse situation of course does exist, see the case of the UK and Ireland.
[100] Note also the link between the Schengen Agreements and Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003, L50/1 ("Dublin II Regulation"). All SAC have associated themselves with this Regulation through agreements with the Community. See Article 7, Schengen Association Agreement NO/IS. The Schengen Association Agreement CH/LI in Article 15(4) states even more clearly that it shall only be applied if the Dublin rules are implemented. See also Chapter V.
[101] However one could perhaps argue that at the external borders (airports), Switzerland could refuse entry to nationals of the new Member States. Here a parallel may be drawn with Schengen visas with limited territorial validity, which allow for entry into the issuing Member State alone, see Chapter VI.
[102] 'Swiss-EU relations challenged by eastern workers referendum' (*EUObserver*, 6 February 2009).
[103] Council Decision 2000/29/EC on the conclusion of the Agreement with Iceland and Norway on the establishment of rights and obligations between Ireland and the UK, on the one hand, and Iceland and Norway, on the other, in areas of the Schengen acquis which apply to these States, *OJ* 2000, L15/1.

the conditions of full implementation of the *acquis* to the extent that they participate in that *acquis*.

3.5 Accession Member States

Article 8 of the Schengen Protocol requires that the Schengen *acquis* be fully accepted by all States candidates for accession.[104] This has been interpreted to mean that all new Member States need to fulfill the requirements of the *acquis* upon entry to the EU, in particular a high level of border control at the external border as required by Article 6 CISA.[105] Unlike the UK, Ireland and Denmark, they do not have the opportunity to opt-out of parts of the Schengen *acquis*.

Border controls are not lifted immediately upon accession. Their removal depends on a separate Council decision based upon "careful examination of the legal and practical readiness of the new Member States" individually.[106] Consequently, the "old" Schengen Member States remain responsible for controls at what remain for the time being *de facto* external borders, *i.e.* the border between "old" and "new" Member States.[107] Accession states have nevertheless been required to ensure a sufficiently high level of border control at the future external border. The SBC provides that Member States up to the date of full application of the Schengen *acquis* may jointly control their common internal borders, in which case a person may be stopped only once for the purpose of carrying out entry and exit checks.[108]

The decision to lift border controls at the temporary external borders was considerably delayed since a new SIS, SIS II which was considered to be indispensible for the lifting of internal borders, was not operational on time.[109] At the initiative of Slovenia and Portugal the

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[104] The decision that accession countries would have to implement to Schengen *acquis* in full, has been identified as an important impetus for its integration by the Treaty of Amsterdam: Lavenex, S. and Wallace, W., 'Justice and Home Affairs: Towards a "European Public Order"?', in: Wallace, H. *et al*., *Policy Making in the European Union* (Oxford, OUP, 2005), 465.

[105] Article 3(1), 2003 Act of Accession, *OJ* 2003, L236/33 and Article 4(1), 2005 Act of Accession, *OJ* 2005, L157/2003. See also: Borissova, L., 'The Adoption of the Schengen and the Justice and Home Affairs *Acquis*: The Case of Bulgaria and Romania, 8 *EFARev* 1 (2003), 110-111.

[106] Chapter 24 on Justice and Home Affairs, *acquis communautaire*: http://europa.eu.int/comm/enlargement/negotiations_eu10_bg_ro/chapters/chap24/index.htm. Article 3(2) Act of Accession 2003 and 4(2), Act of Accession 2005, *supra* note 105.

[107] Also referred to as "temporary external borders": Article 2(2), Decision No 574/2007/EC establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', *OJ* 2007, L144/22 (hereinafter: 'EBF').

[108] Article 17(1), Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006, L105/1.

[109] Council Document 9778/2/05, Council and Commission Action Plan implementing the Hague Programme.

EU10 Member States were therefore linked to SIS I, which was renamed SISI4ALL or SIS1+.[110] Border checks have now been lifted at the internal borders of the EU10 countries, excluding Cyprus.[111] Romania and Bulgaria are awaiting a Council Decision.

4. Political or Legal Uncertainty regarding Member States' Borders

In a number of Member States there remains political and/or legal uncertainty as regards the demarcation of their borders, which will influence the location of both the Schengen external border and the external border of the area in which there is the Community free movement of persons. This section will discuss the situation at the borders of Cyprus, the Baltic States, Gibraltar and Slovenia.[112] In the case of Cyprus the occupation of part of the island has necessitated a special regime for the application of the Schengen *acquis*. The unclear borders of Estonia and Latvia with Russia shows that this does not have to prevent the full application of the Schengen *acquis*. The Gibraltar border is of interest for it constitutes a Schengen external border, as well as simultaneously being a border between EU Member States at the same time. The disagreement between Slovenia and candidate Member State Croatia show that territorial disputes may have far reaching consequences in the context of enlargement.

4.1 Cyprus

The situation as regards Cyprus is legally complex, not merely for the presence of the UK sovereign bases. Since 1964 a UN Peacekeeping Force in Cyprus (UNFICYP) has been present at the island to prevent clashes between the Greek and Turkish Cypriot population.[113] Since 1974, the island has been divided after a Greek-supported coup led to a Turkish

[110] As of 7 July 2007 all EU10 Member States, except Cyprus, got access to real SIS data: Council Decision 2007/471/EC on the application of the provisions of the Schengen *acquis* relating to the SIS, *OJ* 2007, L179/46.
[111] Council Decision 2007/801/EC on the full application of the provisions of the Schengen acquis, *OJ* 2007, L323/34.
[112] One could add to this list the conflicting claims over the waters separating Greece and Turkey and the dispute between Spain and Morocco on the sovereignty over the Spanish enclaves of Ceuta and Melilla and four insular formations, including the delimitation of the waters off the coasts of these "presidios". The reader is referred here to the work of Ahnish, F.A., *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (Oxford, Clarendon Press, 1993). A border conflict between Romania and Ukraine was recently adjudicated in *Maritime Delimitation in the Black Sea* (Romania/Ukraine), ICJ Reports, judgment of 3 February 2009, *nyr*.
[113] UNSC Resolution 186 (1964), UNSC Resolution 1642 (2005) extends the mandate of the UNFICYP to 15 June 2006.

invasion and the occupation of the northern part of the island. The UN has since been patrolling a buffer zone, also referred to as the "green line" and ensuring that there is no alteration of the status quo along the two ceasefire lines drawn on 16 August 1974. In 1983 a Turkish Republic of North Cyprus was declared, but has been recognised only by Turkey.[114]

With the rejection by the Greek Cypriots of the UN Secretary General Kofi Annan's Cyprus peace plan on 24 April 2004, hopes that a united Cyprus would join the EU vanished. The Helsinki European Council had nevertheless already decided that non-solution of the problem could not hinder the islands efforts to join the EU.[115] As a result the protocol on Cyprus attached to the Accession Treaty foresees in "the suspension of the application of the *acquis* in the areas of the Republic of Cyprus in which the government of the Republic of Cyprus does not exercise effective control."[116] This situation is analogous to that of Germany before reunification.[117]

The so-called "Green Line Regulation" provides for the terms under which the relevant provisions of EU law shall apply to the line between those areas in which the Government of the Republic of Cyprus exercises effective control and those in which it does not.[118] The Regulation states in recital 7 that the Green Line does not constitute an external border, but that "special rules should secure an equivalent standard of protection of the security of the EU with regard to illegal immigration and threats to public order." The Republic of Cyprus is therefore held to carry out checks on all persons crossing the line with the aim of combating illegal immigration of third country nationals and to detect and prevent any threat to public security and public policy.[119] The Regulation provides that all persons shall undergo at least one such check in order to establish their identity.[120] This can be compared to the situation under the SBC.[121] Article 2(5) of the Green Line Regulation provides that checks on persons at the boundary between the Eastern SBA and the areas not under effective control of Cyprus, are carried out by the UK in accordance with Article 5(2) of Protocol 3 to the Act of Accession. Part Four of the Annex states that the UK shall use mobile units to carry out external border surveillance between border crossing points and at

[114] UNSC Resolution 541(1983).
[115] European Council Conclusions, Helsinki, 11 December 1999, point 9(b).
[116] Article 1(1), Protocol No 10 to the Act of Accession of Cyprus, *OJ* 2003, L236/950.
[117] Skoutaris, N., 'Differentiation in European Union Citizenship Law: The Cyprus Problem', in: Inglis, K., and Ott, A. (Eds), *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Groningen, Europa Law Publishing, 2005), 166.
[118] Council Regulation (EC) No 866/2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession (hereinafter: "Green Line Regulation"), *OJ* 2004, L161/128.
[119] Article 2(1), *ibid*.
[120] Article 2(2), *ibid*.
[121] Article 7, SBC. See in detail Chapter VI.

crossing points outside of normal opening hours, in a way which discourages people from circumventing the checks at crossing points. *De facto* the Green Line functions as a temporary external Schengen border as long as a solution to the Cyprus issue is not found.

Meanwhile irregular migration from the northern part of the island into the part that is under the effective control of Cyprus has been identified as a growing problem.[122] The Cypriot authorities are reluctant to step up their surveillance of the line fearing that this may give it a more permanent character as an external border.[123] The Commission in its Report on the Implementation of the Green Line Regulation called for a substantial strengthening, "also in view of the future participation of Cyprus in the Schengen area."[124] However, since the Green Line does not legally constitute an external border, important legislation for the management of the external borders such as financial assistance under the EBF or support from the European Agency for the Management of Operational Cooperation at the External Borders of the Member States (Frontex) cannot be allocated for this purpose.

4.2 The Baltic Countries

A not fully demarcated Schengen border can be found in the Baltic. Lithuania signed a border treaty with Russia in 1997, which was ratified by Lithuania in 1999 and by Russia in 2003. However, the demarcation of the Russian-Estonian and Russian-Latvian border has been much more problematic. Border issues for Latvia and Estonia have involved "implicit assertions of their newly found independence and sovereignty," while for Russia they have provided a means of expressing discontent on the enlargement of NATO and the treatment of the Russian minority in both countries.[125]

In cases where the Latvian state border did not conform to bilateral agreements which were in force by 16 June 1940, the date on which Latvia was occupied by the Soviet Union, the Latvian government considered these borders as interim demarcation lines until new

[122] COM(2008) 529 final, Commission Communication, Annual Report on the implementation of Council Regulation (EC) 866/2004 of 29 April 2004 and the situation resulting from its application, 3-4.
[123] *Ibid*., 5.
[124] *Ibid*.
[125] Gromovs, J., 'Latvia's EU Accession and the Russian Border', in: DeBardeleben, J. (Ed.), *Soft or Hard Borders - Managing the Divide in an Enlarged Europe* (Aldershot, Ashgate, 2005), 184. The absence of a large Russian minority in Lithuania may explain why a border treaty was more readily concluded here. See in more detail on Estonia: Viktorova, J., 'Transformation or Escalation? The Estonian-Russian Border Conflict and European Integration' (Birmingham, EU Border Conflicts Studies WP 21, August 2006).

bilateral agreements would have been concluded. These interim demarcation lines ran west of the border established by a 1920 Peace Treaty between Russia and Latvia.

A border treaty between Latvia and Russia was to be signed in May 2005. This Treaty recognised the *de facto* border as inviolable and contained no reference to the 1920 Peace Treaty. The Latvian government did attach an interpretative declaration on 29 April, in which it stated: "the Border Agreement in no way affects the legal rights of the Latvian state and its citizens under the 1920 Latvia-Russia Peace Treaty and the Latvian constitution pursuant to international law."[126] Russia reacted by refusing to sign the agreement, signing a border treaty with Estonia on 18 May 2005 instead.

The Estonia-Russia border treaty was warmly welcomed by EU High Representative for the Common Foreign and Security Policy (CFSP), Javier Solana, expressing hopes for swift ratification and for signature of a similar agreement between Russia and Latvia.[127] Like the Latvia-Russia Treaty, the Estonia-Russia agreement contained no reference to previous treaties with Russia and established the *de facto* border as inviolable. However, when the Estonian Parliament in the law on ratification included in the preamble a reference to Soviet occupation and the 1920 Tartu Peace Treaty, Russian President Vladimir Putin ordered Russia's withdrawal from the Treaty.[128]

In November 2005, Benita Ferrero-Waldner, Commissioner for External Relations and ENP, underlined in a reply to an inquiry by leaders of the European Parliament's foreign affairs committee that the EU considered the problem of the Estonian-Russian and Latvian-Russian border treaties as something affecting the regional integrity of the entire Union and that signature of the outstanding border treaties was a priority for the EU.[129] Nevertheless, the then JLS Commissioner Frattini had already stated in September of the same year that "[t]he EU would support a positive result with the border treaty [...] but this situation [could not] impede the path of Latvia towards the joining the Schengen area".[130]

On 27 March 2007, the border treaty with Russia was finally signed in Moscow, after the Latvian Parliament had formally withdrawn its interpretative declaration. Both countries

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[126] Socor, V., 'Baltic Border Agreements on Agenda for EU-Russia Summit, 2 *Eurasia Daily Monitor* 85 (2005). See for an unofficial translation of relevant parts of this treaty: Information note on the Border Treaty between the Russian Federation and the Republic of Latvia (European Parliament Document, 8 June 2006): http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/d-ru20060615_07/d-ru20060615_07en.pdf.

[127] High Representative for CFSP, 'EU HR Javier SOLANA welcomes the signature of the Estonian-Russian border agreement' (Press Release Nr S188/05, 18 May 2005).

[128] 'Russia revokes Estonia border agreement' (*The Washington Times*, 2 September 2005).

[129] 'EU Commissioner has raised issue of Estonian-Russian border treaties' (*Estonian Review*, 15 November 2005)

[130] 'Latvia could join EU Schengen area without border pact with Russia – Frattini' (*AFX News*, 4 eptember 2005).

exchanged ratification instruments on 18 December 2007. Relations between Russia and Estonia however remain tense and no steps have been taken towards a solution.[131] This has not however prevented the lifting of border checks between Estonia and the rest of the Schengen area, without specific arrangements being put in place. In reply to a question by a Member of European Parliament the Council stated that "[a]lthough border issues essentially fall within the competence of Member States, the Council attaches importance to the legal certainty of those borders, as well as to stable relations between EU Member States and Russia."[132] It therefore considered that Russia should ratify the border agreement with Estonia as soon as possible and that the demarcation of all EU-Russia borders should be completed according to international standards as set out in the Road Map on Freedom, Security and Justice.[133]

4.3 Gibraltar

We have already noted in the previous chapter how disagreement between the UK and Spain on the border of Gibraltar prevented the adoption of the External Frontiers Convention. The Gibraltar border not only forms a border between Member States, but is also a Schengen external border. The disagreement over the border has meant that the application of important legislation on the management of the external borders is suspended in relation to the Gibraltar borders.[134]

The disagreement on the Spanish-Gibraltar border forms part of a wider problem in which not only the borders of Gibraltar are disputed, but also the sovereignty *per se* of the UK over the territory.[135] The question on the position of the border revolves around the interpretation of Article X of the 1713 Treaty of Utrecht, by which Spain yielded to the UK: "The full and entire propriety of the town and castle of Gibraltar, together with the port,

[131] Relations between the two countries saw an all time low with the removal of a Soviet war time statute and alleged cyber attacks from Russia on Estonian computer systems in 2007: 'Estonia accuses Russia of "waging cyber war"' (*The Times*, 17 May 2007).
[132] Reply from the Council of 18 March 2008 to a question by MEP Saks (PSE) of 7 February 2008 (P-0614/08).
[133] Road Map for the Common Space of Freedom, Security and Justice (Council Document 8799/05 ADD 1), point 1.2.
[134] See for instance Article 12(3), Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L 349/1.
[135] Spain's claim of sovereignty over the rock, based on the right of territorial integrity, was renewed in the 1960s by Spanish dictator Franco. The inhabitants of Gibraltar have at times claimed a right of self-determination on the basis of Article 1 of the UN Charter.

fortifications, and forts thereunto belonging (…) without any territorial jurisdiction."[136] Spain has argued that this cession did not include the territory north of the Rock, nor a territorial sea. The UK has throughout argued to the contrary and that in any case it acquired title through prescription by the acquiescence of Spain as regards its continuous presence since at least 1838 by which British sentries were established along the line of the present frontier fence.[137]

Spain further contests that in Article X it ceded to the UK the waters adjacent to Gibraltar. Here the UK has a strong claim in that the Permanent Court in *Grisbadarna* held that it is a settled principle of maritime law that "maritime territory is an essential appurtenance of land territory", implying that cession of the land territory included a territorial sea.[138] Both countries have made reservations to the UN Convention on the Law of the Sea (UNCLOS) which allows for a 12 mile territorial sea, reflecting their respective positions and an agreement has yet to be reached.

After the restoration of democracy in Spain, bilateral initiatives were taken in order to normalise relations. These initiatives have always included the facilitation of the movement of persons across the Spanish-Gibraltar border. With the accession of Spain to the EC this free movement of persons became a legal obligation, bearing in mind that the free movement rights apply to Gibraltar in full and most of its citizens have UK and consequently EU citizenship. Nevertheless, delays have remained notorious impeding, in the view of the Gibraltarians, the effective exercise of their Community right of free movement.[139]

In 2002, an agreement in principle was reached on joint sovereignty, but this was overwhelmingly rejected by the Gibraltar population in a referendum on 7 November 2002. Recent progress has been made within the framework of the Trilateral Forum of Dialogue on Gibraltar, which includes the ministers of both the UK and Spain, as well as Gibraltar. Although neither party has changed its position regarding the sovereignty issue, on 18 September the three Governments issued a communiqué, commonly referred to as the Córdoba Agreement, on the outcome of their tripartite talks.

In relation to the crossing of the border, the Agreement provides for an improvement of the facilities for border controls and the introduction of a system of red and green

[136] See for the full text of Article X: Fawcett, J., 'Gibraltar: The Legal Issues', 43 *IA* 2 (1967), 238-239.
[137] The fence was erected in 1909 in the middle of the neutral zone between the rock and the Spanish guarded "Linea". Levie, H., argues that the negotiation history leaves no doubt the UK has no legal basis for its claim over the neutral ground: 'Gibraltar', in: Bernhardt, R. (Ed.), *Encyclopedia of Public International Law, Volume I, No. 10* (Amsterdam, North Holland, 1992), 598. Fawcett, J., *ibid.*, argues that the Spanish refusal in 1966 to have the border definitely determined is a strong indication of acquiescence, 241.
[138] Ahnish, F, *supra* note 9.
[139] 'The Rocky Road to Spain' (*BBC News*, 13 March 2002).

channels.[140] It further foresees in the joint use of the Gibraltar airport, situated in the neutral zone south of the fence, following the model of the French/Swiss Geneva airport.[141] The airport will have an access point from the north side of the fence and from the south side. Passengers on flights to and from Spain entering or leaving the airport through the north side will be considered not to have left the Schengen area.

Gibraltar officials retain the right to exercise controls on passengers on flights to and from the Schengen area entering or leaving the airport through the north side on grounds of security or in other exceptional or unusual circumstances. Passengers on flights to and from Spain entering or leaving the airport through the south side are subject to Schengen exit and entry checks by Spanish officials, after which they will go through an entry clearance by Gibraltar officials. The Gibraltar government has repeatedly pointed out that Spain will not control entry to or exit from Gibraltar, rather Schengen entry and exit checks take place at Gibraltar airport instead of in Spanish airports.

4.4 Slovenia and Croatia

A dispute over borders that has recently been making headlines is that between Member State Slovenia and candidate country Croatia. Although it centres around the demarcation of the maritime border in the Bay of Piran, there are three other unresolved conflicts regarding the border on the Mura River, the Trdinov vrh or Sveta Gera Mountain and in the valley of the Dragonja River.[142]

Although both Slovenia and Croatia in principle accept the conclusions of the Badinter Commission, stating that the borders of the successor states should follow those of the internal borders of the former Yugoslav Federation, in some areas there is uncertainty over the location of that border.[143] In the Bay of Piran Croatia invokes the equidistance principle of Article 15 of the UN Law of the Sea (UNCLOS), which defines a median line as border, while Slovenia refers to the same article stating that the "provision does not apply, however,

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[140] 2006 Córdoba Agreement: http://www.gibnet.com/texts/trip_1.htm.
[141] That is before Switzerland's association with the Schengen *acquis*. See Annex II to the 2006 Agreement: Ministerial Statement on Gibraltar Airport (18 September 2006): http://www.gibraltar.gov.gi/latest_news/press_releases/2006/Ministerial_Statement_On_Gibraltar_Airport.pdf. As part of the arrangements, the airport of Gibraltar will no longer be suspended from EC Regulations and Directives on aviation measures.
[142] See in more general: Klemenčíc, M., and Gosar, A, 'The problems of the Italo-Croato-Slovene border delimitation in the Northern Adriatic,' 52 *GeoJournal* (2000), 129–137.
[143] See Chapter II on the Badinter Commission.

where it is necessary by reason of historic title or other special circumstances to delimit territorial seas of the two States in a way which is at variance therewith." It argues that Slovenia has since the entry into force of the 1975 Osimo agreement between the former Yugoslavia and Italy exercised jurisdiction over the Bay of Piran and that the application of the equidistance principle would deprive the country of access to open seas.[144]

The Drnovšek-Račan Agreement of 2001 granted Slovenia a corridor to open sea, in return for Croatian sovereignty over a number of villages whose status was unclear due to overlapping land-registry books of local municipalities. It was however rejected by the Croatian parliament and not ratified. On 29 August 2007, the two countries informally agreed in the Slovenian town of Bled to bring the border dispute before the International Court of Justice (ICJ) and set up a mixed Slovenian-Croatioan expert commission to draft the terms of reference.

This solution would be in line with the Conclusions of the Helsinki European Council which urged in clear terms that "candidate States (…) make every effort to resolve any outstanding border disputes and other related issues. Failing this they should within a reasonable time bring the dispute to the International Court of Justice."[145] Also the Negotiating Framework for Croatia from 2005 state that border issues should be resolved through bilateral negotiations or at the ICJ in The Hague.[146]

In October 2008 Slovenia called upon Croatia to withdraw maps and documents it has submitted as part of its EU accession negotiations which would prejudge the border between the countries, Croatia denying the existence thereof. In December 2008, Slovenia vetoed the opening of new negotiations chapters and the closing of others in the accession process of Croatia, thereby eventually delaying the country's entry into the EU. It no longer seemed willing to submit the question for adjudication by the ICJ, arguing the question is political, rather than legal.[147]

The Commission proposed the setting up of a mediation group chaired by Nobel Peace Prize winner Ahtisaari, but in March 2008 the countries failed to agree on its terms.[148] A second, unpublished, proposal of April 2008 by Enlargement Commissioner Olli Rehn intended to set up an *ad hoc* arbitration panel with judges nominated by both sides, as well as

[144] See for an elaborate discussion of the legal questions and arguments put forward by both countries: Avbelj, M. and Letnar Cernic, J., 'The Conundrum of the Piran Bay: Slovenia v. Croatia - The Case of Maritime Delimitation,' 5 *J Int'l L & Pol'y* (2007), 1-19.
[145] European Council Conclusions, Helsinki, 10-11 December 1999, point I.4.
[146] Commission, 'Principles governing the negotiations', Luxembourg, 3 October 2005, point 13.
[147] 'Ljubljana "ready" to accept mediation in Croatia dispute' (*Europolitics*, 17 February 2009).
[148] 'Croatia accepts EU help to solve dispute with Slovenia' (*EurActiv*, 10 March 2009).

by the Commission was rejected.[149] The Commission now seems to have given up on its efforts, calling for bilateral talks and cancelling an EU-Croatia intergovernmental conference planned for 26 June 2009.[150]

The border dispute between Slovenia and Croatia casts dark clouds over future enlargements on the Western Balkan. Although legally, a border which is not fully demarcated does not have to stand in the way of a country's entry into the EU, nor the full application of the Schengen *acquis*, as shown by the case of Estonia, Slovenia continues to have a veto over unfreezing negotiations. Very few (potential) candidate countries do not have outstanding border issues and nothing would seem to prevent Croatia, once a Member State, from adopting a similar strategy.[151]

5. Conclusion

In view of the communitarisation of the powers for the management of the external borders, including the incorporation of the part of the Schengen *acquis* relating to the external borders, this chapter took as its point of departure Article 299 EC defining the territorial scope of the EC Treaty. It will be clear that Article 299 EC must be seen as a *prima facie* definition of the geographical scope of EC law, specific parts of which are however either limited or expanded by other primary EU law (Schengen Protocol), as well as international treaties (agreements with Iceland, Norway and Switzerland).[152]

There can be an increasing congruence observed between the area of free movement of persons and the Schengen area. This is first of all the case within the EU, notwithstanding of course the non-applicability of the Schengen *acquis* in non-European parts of the EU territory. First of all, Article 8 of the Schengen Protocol obliges all acceding Member States to accept the Schengen *acquis* in full. The lifting of checks at the internal borders with the EU10 Member States, as well as the expiring of the transitional measures for the free movement of persons, is leading to a more homogenous legal space, with consequently more homogenous external borders. Also in the case of the Schengen Associated countries of

[149] 'EU proposes panel to resolve Slovenia-Croatia row' (*EUbusiness*, 15 April 2009).
[150] 'EU officials tire of Croatia-Slovenia dispute' (*EUobserver*, 24 June 2009).
[151] See the progress reports for the (potential) candidate countries: http://ec.europa.eu/enlargement/press_corner/key-documents/reports_nov_2008_en.htm
[152] It should be noted that in the case of the Customs Union, this limitation is made by secondary law: Article 3, Council Regulation (EEC) No 2913/92 establishing a Community Customs Code, *OJ* 1992, L302/1.

Norway, Iceland and Switzerland, the extension of the EC's *acquis* on the free movement of persons has now been "matched" with the lifting of internal border controls.

Notwithstanding the extension of parts of EC law to third countries, the ECJ has clearly underlined in its EEA opinions, the supremacy and independence of the EU legal order. Consequently, the associated countries' participation in the freedom of movement of persons and even more so in the Schengen *acquis* is very much on a "take it or leave it" basis. Arguably this drive towards homogeneity can also be discerned in the provisions of the Schengen Protocol allowing the UK and Ireland to participate in parts or all of the Schengen *acquis*. The Court has however given a clear message to the UK and Ireland that they cannot have their cake and eat it at the same time. As was suggested, this may eventually encourage rather than discourage further integration of these countries in the Schengen *acquis*, by pointing out some of the disadvantages of their non-participation.

Both the limitations to and the extensions of the geographical scope of EC law have lead to a patchwork if not as much of the obligations themselves, then of the institutional framework upon which they are built. This is evidenced by the protocols attached to the EC/EU Treaties, as well as the number of bilateral treaties necessitated by each enlargement of the EU.

In spite of a number of unresolved issues at the borders of a number of Member States, to say that Europe's legal borders are not well defined seems too strong a conclusion to draw. Rather one should argue that other than in the narrow sense of the Schengen external border, there does not exist a Community law concept of an external border. The Schengen external border then is clearly defined, albeit that the definition thereof in Article 2(2) of the Schengen Borders Code is deceivingly transparent.

It is the external borders of the Schengen area that form the object of the Community's legislative competences in the area of border management, not the borders of the area of free movement of persons. However, because of the increasing overlap between these two, the Schengen borders gain importance as a point at which authority and control is exercised not merely in the name of sovereign States, but also in that of the greater Union they represent in doing so.

V. Crossing Borders: Community Rights of Free Movement

1. Introduction

In the preceding chapters it was established that "the" EU external border does not exist. One may argue that for EU citizens and third country nationals (TCN) alike, there is one functional border (based on the existence of border crossing rights on the basis of the Community rights of free movement), and two geographical borders (the Schengen border and the EU, non-Schengen, external border). From a substantive point of view the most important distinction is then the difference in treatment afforded to EU citizens and TCNs at either of these geographical borders.

This chapter will examine the Community rights of free movement in so far as these are relevant to the existence of border crossing rights. In doing so, it will refine the distinction between EU citizens and TCNs. Advocate General (AG) Geelhoed in his opinion to the *Jia* case distinguished between the internal aspect and external aspect of migration, the latter being, at the current state of Community law, for most aspects firmly in the hands of the Member States.[1] A discussion of the European Court of Justice's (ECJ) case law on the position of a TCN who joins his/her EU family member in another EU Member State, coming directly from outside the EU, will serve to underline the continuing importance Member States attach to their competences as regards that external aspect. This also shows in the way in which (limited) the free movement rights have been conferred on TCNs on the basis of secondary legislation under Title IV EC.

2. Border Crossing Rights based on EU Citizenship

The free of movement of persons is one of the four fundamental Treaty freedoms. It applies to the nationals of the Member States, to the exclusion of TCNs.[2] The right has developed from being linked exclusively to the economic activity under Articles 39, 43 and 49 EC, through persons of independent means[3] and students[4] to a more general right of free movement of European citizens

[1] Opinion AG Geelhoed to Case C-1/05, *Jia* [2007] ECR I-1, delivered 27 April 2006, paras 31-32.
[2] Case 238/83, *Caisse d'Allocations v Meade* [1984] ECR 2631, para. 7.
[3] Council Directive 90/364/EEC on the right of residence, *OJ* 1990, L180/26 ("Playboy Directive").
[4] Council Directive 93/96/EEC on the right of residence for students *OJ* 1993, L317/59.

up to three months under Article 18(1) EC.[5] Article 18(1) EC states that the right to free movement is "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." Indeed, more extensive rights of residence are still dependent on a degree of self-sufficiency of the EU citizen.[6]

The Court has from the beginning given a broad interpretation to the right of free movement of Community nationals - including the right of entry and exit - whilst interpreting exceptions narrowly.[7] In *Cowan* it interpreted Article 49 EC on the free movement of services, so as to include the recipient of services.[8] In *Antonissen*, it made clear that Article 39 EC, on the free movement of workers, also applies to those Member State nationals in search of employment.[9] Under Directive 2004/38/EC, all EU citizens now have an uncontested right of entry, exit and residence in another Member State than their own, for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.[10]

The right of entry must be considered to exist independent from the question whether the EU citizen enters a Member State other than that of his/her nationality by crossing an intra-Community border or directly from a third country.[11] Although the title of Directive 2004/38/EC clearly refers to free movement *within the territory of the Member States* this is only logical as no individual EU Member State would be able to refuse entry to one of its own nationals. Indeed Article 5(1) does not make any distinction in this regard.[12] The rights of the EU citizen to cross

[5] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* 2004, L158/77. See Farkas, O., 'Free movement and European citizenship: leaving behind the labour supply approach' (Paper presented at the EUI Alumni Association Interdisciplinary Conference: The Maastricht Treaty in Historical Perspective: A Watershed in European Integration?, EUI, Florence,5-6 October 2006).
[6] Carrera, S., 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU?', 11 *ELJ* 6 (2005), 701.
[7] Case 139/85, *Kempf* [1986] ECR 1741, para. 13.
[8] Case 186/87, *Cowan* [1989] ECR 195, para. 15, Joined Cases 286/82 and 26/83, *Luisi and Carbone* [1984] ECR 377, para. 16, Case C-348/96, *Calfa* [1999] ECR I-11, para. 16. In Case C-274/96, *Bickel and Franz* [1998] ECR I-7637, para. 15, the Court referred in even broader terms to the intention or likelihood to receive services.
[9] Case C-292/89, *Antonissen* [1991] ECR I-745, para. 13. Note that later Directives - Council Directive 90/364/EEC ("Playboy Directive"), *supra* note 3 and Council Directive 93/96/EEC (students), *supra* note 4 - only deal with residence, presupposing a right of entry and exit.
[10] Article 6, Directive 2004/38/EC, *supra* note 5.
[11] Only recently the European Court of Justice has confirmed this position also in relation to TCNs with derived rights under Community law: Case C-127/08, *Metock* [2008] ECR I-0000, *nyr*, see in detail below.
[12] The fact that this right is to be considered the same at both the internal and external Community borders does not necessarily mean that the conditions under which it is exercised are the same: see the next chapter on the rules applicable at the Schengen external borders.

an intra-Community border are the same as those relating to the crossing of the Community's external borders, be these Schengen borders or not.

2.1 EU Citizenship

At the outset, a few words need to be said about the concept of European citizenship, in view of the important legal consequences of this status. Article 17(1) EC states that every person holding the nationality of a Member State shall be a citizen of the Union. The European Council of 11 and 12 December 1992 attached a declaration on nationality to the Treaty of Maastricht stating that: "The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned."

The European Court of Justice (ECJ) has confirmed the Member State's autonomy in nationality matters in the *Micheletti* case in which it held that the conditions of acquisition and loss of nationality are, in conformity with international law, within the competence of each Member State.[13] It added however, that this competence must be exercised with due regard to Community law. Considering the fact that the conferral of nationality by one Member State may have far reaching consequences for other Member States, one could envisage a situation in which the conferral of nationality amounts to a breach of the principle of sincere cooperation under Article 10 EC.[14]

Despite the wording of Article 17(1), not all nationals of Member States are EU citizens.[15] Both the UK and Germany have made unilateral declarations, adopting a definition of nationality for the purposes of Community law differing from domestic law.[16] Danish nationals residing in the Faeroe Islands are not to be considered as Danish nationals within the meaning of the

[13] Case C-369/90, *Micheletti* [1992] ECR I-4258, para. 10. The ECJ in this case granted Member States a greater autonomy then the International Court of Justice did in its *Nottebohm* judgment, in which it held that the grant of nationality needs only be recognised by other States if it represents the individual's "genuine connection with the State": *ICJ Reports* (1955), 4, para. 24.

[14] De Groot argues this could for instance be the case if a Member State were to grant its nationality to an important part of the population of a non-EU Member State, without prior consultation of the other Member States: De Groot, G.-R., 'Towards a European Nationality Law', 8 *EJCL* 1 (2004), 12.

[15] See for more detail: Hall, S., *Nationality, Migration Rights and Citizenship of the Union* (Dordrecht, Martinus Nijhoff, 1995).

[16] The Declaration that currently applies dates back to 1983 (*OJ* 1983, C23/1). The German declaration, which was first made at the signature of the EEC and Euratom Treaty, has lost its practical relevance through an amendment of the German nationality law in 2000 granting nationality automatically to anyone recognised as German within the meaning of Article 116 of the German Basic Law.

Treaties.[17] Further questions of citizenship arise in the case of so-called kin-minorities in Central and South-Eastern Europe, in particular where the kin minority is located outside the EU. On 5 December 2004, a referendum on the question whether to grant Hungarian citizenship to ethnic Hungarians living outside their homeland was rejected. In late 2006 however the Greek government opened up Greek nationality to members of the Greek minority in Albania.[18] In the months before their entry into the EU, applications for the nationality of Romania and Bulgaria by Moldavians of Romanian ethnicity and Macedonians of Bulgarian ethnicity respectively saw a considerable increase.[19]

Another complicating factor is the fact that large parts of the Latvian and Estonian population of Russian origin are not EU citizens, either having Russian nationality or falling within the category of "non-citizens."[20] Similar complications could arise as regards the Turkish settlers in the northern part of the Cyprus upon reunification of the island.[21]

2.2 Right of Exit and Entry of EU Citizens

On 30 April 2006, the deadline for implementation of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States has passed.[22] This Directive abolishes the sectoral approach to free movement

[17] Article 4 of Protocol No 2 to the Treaty of Accession of Denmark.
[18] 'New citizenship drive: Gov't to naturalize some 200,000 ethnic Greeks from Albania' (*Kathimerini*, 6 November 2008).
[19] 'Romania tackles Moldova visa rush' (*BBC News*, 16 January 2007) and 'Cashing in on EU citizenship' (*Spero News*, 22 January 2007).
[20] A 2000 'Population and Housing Census' in Estonia showed that the Russian population amounted to 6.3 percent and the number of non-citizens to 12.4: http://www.stat.ee/censuses. The numbers of non-citizens has been steadily decreasing through naturalisation to 7.5 % on 2 June 2009: Estonian Ministry of Foreign Affairs website, 'Citizenship', 8 June 2009: http://www.vm.ee/estonia/kat_399/pea_172/4518.html. Also in Latvia, the number of 'non-citizens' has been steadily decreasing. On 1 January 2009 it however still constituted 15,8 % of the Latvian population, with a Russian population amounting to 1,3 percent: http://data.csb.gov.lv.
[21] See for more detail: Skoutaris, N., 'Differentiation in European Union Citizenship Law: The Cyprus Problem', in: Inglis, K., and Ott, A. (Eds), *The Constitution for Europe and an Enlarging Union: Unity in Diversity?* (Groningen, Europa Law Publishing, 2005), 169 ff.
[22] Directive 2004/38/EC, *supra* note 5. In December 2008, the Commission published the report on the application of the Directive under Article 39, in which it was highly critical: "not one Member State has transposed the Directive effectively and correctly in its entirety.": COM(2008) 840 final, 3. See in more detail: Carrera, S. and Faure Atger, A., 'Implementation of Directive 2004/38 in the context of EU Enlargement: A proliferation of different forms of citizenship?' (Brussels, CEPS Special Report, April 2009).

with an approach based on EU citizenship. Most importantly it repeals Directive 68/360/EEC[23] which contained the rules on free movement of EU citizens who are workers and their family members, as well as Directive 73/148/EEC[24] which contained the rules of free movement of EU citizens and their family members with regards to establishment and the provision of services.

Article 4 gives EU citizens and their EU citizen family members a right of *exit* upon production of a valid identity card or passport. Family members are defined in Article 2 of the Directive and include the spouse, registered partner where the host Member State recognizes such a relationship as equivalent to marriage, the dependant family members of the EU citizen and/or spouse/registered partner in the ascending line and in the descending line up to the age of twenty-one.

It is unclear whether the term spouse is to be constructed as including a same-sex spouse. Considerations of non-discrimination, the full effectiveness of the free movement provisions and the respect for the competence of the Member States in matters of family law are strong arguments in favour of recognition of marriage between partners of the same sex.[25]

The term dependent must be interpreted to the effect that they need the material support of the Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national.[26]

The right of family members is highly derivative of the right of the worker they accompany. This is shown for instance by the *Lebon* case, in which the ECJ held that once the child of a worker reaches the age of 21, and is no longer dependent on the worker, benefits to the child cannot be construed as an advantage to the worker.[27] The importance of the family link is also shown in the case of *Diatta*, in which the Court stated that neither living apart nor imminent

[23] Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, *OJ* Sp. Ed. 1968, L257/13, 485.
[24] Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, *OJ* 1973, L172/14.
[25] Bell, M., 'EU Directive on Free Movement and Same-Sex Families: Guidelines on the Implementation Process (Brussels, ILGA Europe, October 2005), 5.
[26] Case C-1/05, *Jia* [2007] ECR I-1, para. 43.
[27] Case 316/85, *Lebon* [1987] ECR 2811, para. 14.

divorce affect the right of the worker's family.[28] However, implied in the judgment is that these rights dissolve upon divorce.

Article 5(1) gives EU citizens and their EU family members a right of *entry* on production of a valid identity card or passport.[29] Member States may not demand an entry or exit visa or similar documents. Article 5(4) codifies the case law of the Court stipulating that if an EU citizen is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse him entry into the territory or deny his right of residence merely for not presenting these documents.[30] A valid identity card issued by a third Member State, which states that the holder has the nationality of one of the Member States, should be allowed to qualify as "valid identity card" under Article 5(1), or else as proof of EU citizenship under Article 5(4).[31]

On various occasions the ECJ has had the opportunity to interpret the rules of Directives 68/360/EEC and 73/148/EEC. In *Pieck* it ruled that an endorsement stamped on a passport at the time of arrival giving leave to enter the territory of the UK amounted to a "visa or any equivalent document" as prohibited by Article 3(2) of Directive 68/360/EEC. The phrase "entry visa or equivalent requirement" covers any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity check at the border, at whatever place or time and in whatever form.[32]

Border guards may not inquire about the purpose and duration of stay and the financial means at the individual's disposal before permitting admission to the Member State's territory.[33] Community law does not prevent a Member State from checking, within its territory, compliance with the obligation imposed on persons enjoying a right of residence under Community law to

[28] Case 267/83, *Diatta* [1985] ECR 567, para. 20.
[29] Note that since Directive 2004/38/EC grants EU citizens a general right of entry and stay for periods not exceeding three months, the derived free movement rights for family members of the EU citizen is mainly of importance in relation to their stay for periods longer than three months, or where the family member is not an EU citizen, see below.
[30] See Case C-215/03, *Oulane* [2005] ECR I-1215, para. 25 and, in the context of TCNs, Case C-459/99, *MRAX* [2002] ECR I-6591, para. 62.
[31] It appears that in practice only a few Member States consider this possible: Carrera, S. and Faure Atger, A., *supra* note 22, 6-7.
[32] Case 157/79, *Pieck* [1980] ECR 2171, para 10. Article 5(1), Directive 2004/38/EC, *supra* note 5, states that: speaks of "No entry visa or equivalent formality may be imposed on Union citizens."
[33] Case C-68/89, *Commission v Netherlands* [1991] ECR I-2637, para. 13.

carry their residence or establishment permit at all times, where an identical obligation is imposed on its own nationals as regards their identity card.[34] However, where such controls take place at the time of entry into the Member State's territory, they may still constitute a barrier to free movement if they are carried out in a systematic, arbitrary or unnecessarily restrictive manner.[35]

None of the cases discussed above involved an EU citizen crossing an external Community border. Although, as we argued above the right of entry into another Member State must be considered independent from the question whether this entry takes place through an internal or external border, one may wonder in how far border formalities may be stricter if entry takes place through the external borders of the Community, especially where this border coincides with a Schengen external border. Considering the emphasis in both the case law and legislation on free movement *within the territory* of the Member States, the Court could find room for a narrower definition of "entry visa or equivalent requirement" than it did in *Pieck*.[36] In practice, the "Bangeman wave" at the intra-Community borders that coincide with the Schengen external borders (e.g. the UK border or the temporary Schengen external borders with Romania and Bulgaria), especially airports, seems to have been replaced with a systematic computer check of passports.[37]

Articles 39(3) and 46(1) EC allow for derogations on the free movement of persons for reasons of public policy, public security or public health. Directive 64/221/EEC was adopted to coordinate all measures relating to entry, deportation and the issuance and renewal of residence permits.[38] Also this Directive has been replaced by Directive 2004/38/EC. In Article 27(2) it takes over the larger part of Article 3 of Directive 64/221/EEC and codifies the existing case law on this article, in which the ECJ has given a narrow interpretation of the rules contained therein.[39]

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[34] Case 321/87, *Commission v Belgium* [1989] ECR 997, para. 12 and Case C-215/03, *Oulane*, [2005] ECR I-1215, para. 35.
[35] Case 321/87, *ibid*., para. 15.
[36] See the next chapter for a discussion of the rules applicable at the Schengen external borders.
[37] The purpose of this check seems to be to verify the authenticity of the document rather than anything else.
[38] Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, *OJ* Spec. Ed 1964, 850/64, 117.
[39] Craig and De Búrca note that most case law deals with the public policy exception which is the less clearly defined concept: *EU Law: Text, Cases and Materials* (Oxford, OUP, 2003), 827. The public security exception was recently invoked by the UK government when it refused entry to Dutch MP Geert Wilders on the basis that his presence could "threaten community harmony and therefore public security by fostering hate which might lead to inter-

Measures derogating from the free movement of persons shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.[40] The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[41] Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.[42]

In a rare case on the right to exit a country, *Jipa*, the ECJ ruled that the fact that an EU citizen has been subject to repatriation from another Member State for illegal residence, may be taken into account in the assessment for the purpose of restricting his/her right of free movement by its home Member State. However, again only "to the extent that the personal conduct constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society."[43] This assessment must be based on the fundamental interests of the Member State imposing the restriction, although reasons advanced by another Member State may be taken into account.[44] While it is certainly the case that it should not be for one Member State to decide on what is in the interests of another Member State, the Court was correct in allowing arguments advanced by other Member State's to be taken into account, thereby serving to protect the wider European interest.

Directive 2004/38/EC replaces the annex to Directive 64/221/EEC which listed the diseases and disabilities threatening public health, public policy or public security with a reference in Article 29 to diseases of epidemic potential as defined by the World Health Organisation.

The procedural safeguards from Articles 5 to 9 of Directive 64/221/EEC have been taken over in Article 31 of Directive 2004/38/EC. EU citizens and their family members as defined in Article 2 of the Directive must have access to judicial and, where appropriate, administrative

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community violence within the UK": Reply by the Parliamentary Under-Secretary of State, Home Office (Lord West of Spithead) to a question asked by Baroness Neville-Jones, 3 June 2009, Lords Hansard, Column WA90.

[40] Case 30/77, *Bouchereau* [1977] ECR 1999, para. 28.

[41] Case 36/75, *Rutili* [1975] ECR 1219, para. 28 and Case C-348/96, *Calfa*, *supra* note 8, para. 25.

[42] Case 67/74, *Bonsignore* [1975] ECR 297, para. 6. Article 33 of Directive 2004/38/EC, *supra* note 5, stipulates that a Member State may not make an expulsion order as a penalty or legal consequence of a custodial penalty.

[43] Case C-33/07, *Jipa* [2008] ECR I-0000, *nyr*, para. 26. The Court held that in the case at hand, the necessary requirements to justify a restriction on the right of free movement did not seem fulfilled, but stated it was up to the national court to make that assessment: para. 27.

[44] *Ibid*., para. 25.

redress procedures in the host Member State to appeal against or seek review of decisions against them taken on the grounds of public policy, public security or public health. The individual concerned may be excluded from the host Member State's territory pending the redress procedure, but may not be prevented from submitting his/her defense in person, except when his/her appearance may cause serious public policy or public security concerns or, and this is important for border procedures, when the appeal or judicial review concerns a denial of entry to the territory.

3. Third Country Nationals

Although free movement rights in general do not apply to TCNs, a number of specifications need to be made. Certain TCNs have a derived right of free movement through their family ties with an EU citizen, others have an independent right under agreements between their country of nationality and the Community. Here again, a discussion of the right to cross the EU's external border cannot be separated from an examination of the provisions on internal free movement.

3.1 Third Country National Family Members of EU Citizens

Under Article 5(2) of Directive 2004/38/EC, TCNs who are family members of an EU citizen have - like the family members that are EU citizens - a derived right of entry and exit upon production of their passport or valid identity card. A valid visa is an additional requirement for TCNs from countries that are on the visa list of Regulation (EC) No 539/2001 or require a visa under the national law of a Member State which is not part of the Schengen area.[45] Member States shall grant such persons every facility to obtain the necessary visas. They shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.[46] An exemption of the visa requirement is granted where the TCN family member of an EU citizen holds a residence card issued in one of the other Member States.[47]

[45] Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *OJ* 2001, L81/1.
[46] Article 5(2), Directive 2004/38/EC, *supra* note 5.
[47] *Ibid*.

In *MRAX*, the Court held that Community law does not preclude the possibility for a Member State to turn away at the border the TCN spouse of an EU citizen who is not in possession of the required documents.[48] However at the same time it is emphasised that the right of such a TCN spouse to enter the territory of the Member State derives from the family ties alone.[49] In order not to deny the provisions of Directives 68/360/EEC and 73/148/EEC their full effect, a visa should be issued without delay and, as far as possible, at the place of entry into national territory.[50] Article 5(4) of Directive 2004/38/EC codifies the Court's ruling in *MRAX* that in the absence of the necessary travel documents or visa, when required, the Member States must give the EU citizen and his family members every reasonable opportunity to corroborate or prove that they are covered by the right of free movement and residence.[51]

Community law does not apply to a wholly internal situation. This was illustrated in relation to TCNs in a number of cases in which nationals of a Member State who had not used their rights of free movement were barred by national law from bringing their TCN relatives into their country and could not rely upon EC law.[52] In *Singh* however, the Court did find a connection factor to Community law, when an Indian national, married to a British national, was refused leave to enter and stay in the UK when he and his wife returned to the UK after a period of employment in Germany. The Court ruled that this constituted a violation of the right to free movement of persons under Article 39 EC, since it would deter a national of a Member State from using his rights, knowing that upon return his/her spouse would no longer be granted entry to and residence in the home Member State.[53]

However, a case in which an EU citizen and TCN wanted to rely on the ECJ's ruling in *Singh*, was to become the source of quite some legal uncertainty as to the position of the TCN who wishes to join his/her EU national family member directly from outside the EU. The *Akrich* case concerned a British national who, on the basis of the *Singh* judgment, moved to work in Ireland with the objective of returning to the UK, bringing her Moroccan husband, who had no right to

[48] Case C-459/99, *supra* note 30, para. 59 and Case 68/89, *supra* note 33, para. 11.
[49] Case C-459/99, *ibid.*, para. 59.
[50] *Ibid*., para. 60.
[51] *Ibid*, para. 62.
[52] Cases 35&36/82, *Morson and Jhanjan* [1982] ECR 3723, para. 17, Case C-64/96, *Uecker and Jacquet* [1997] ECR I-3171, para. 22.
[53] Case C-370/90, *Singh* [1992] ECR I-4265, para. 20.

remain in the UK back with her on the basis of Article 10 of Regulation (EEC) No 1612/68.[54] The ECJ ruled however that this Regulation covered only the freedom of movement within the Community and that it was silent on the rights of a TCN spouse of an EU citizen regarding access to the territory of the Community.[55]

Since Mr. Akrich did not have a right to remain in the Member State of origin of Mrs. Akrich, the fact that the EU citizen had no right under Regulation (EEC) No 1612/68 to install herself with her TCN husband in another Member State would not constitute less favourable treatment than that which she enjoyed before using the right of free movement and could therefore not deter her from using this right.[56] The same would apply on return of the EU citizen to her Member State of nationality. If however the TCN husband would have had a right to remain in another Member State, Article 10 of Regulation (EEC) No 1612/68 would have applied.[57]

Akrich seemed to overrule the part of *MRAX* in which the Court held that "a Member State is not permitted to refuse to issue a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he entered the Member State concerned unlawfully."[58] However, at no point in *Akrich* did the Court refer to its ruling in *MRAX*.

The fact that Article 5 of Directive 2004/38/EC codifies the case law in *MRAX* and does not make the right of the TCN family member to enter and reside with the EU citizen conditional upon prior lawful presence on EU territory seems to support the view that, notwithstanding the ECJ's ruling in *Akrich*, the situation of a TCN spouse entering EU territory through another Member State than the one of which his/her spouse has the nationality remains covered by Regulation (EEC) No 1612/68, currently Directive 2004/38/EC. The ECJ in *Akrich* specifically referred to "a situation such as at issue in the main proceedings" which seems to imply that the judgment had to be confined to the circumstances of the particular case.[59]

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[54] Case C-109/01, *Akrich* [2003] ECR I-9607.
[55] *Ibid*, para. 49.
[56] *Ibid*., para. 53.
[57] *Ibid*., para. 54. See however AG Mengozzi's opinion in Case C-291/05, *Eind* [2007] ECR I-10719, delivered 5 July 2007, para. 142.
[58] Case C-459/99, *supra* note 30, para. 69. See: Spaventa, E., 'Annotation Case C-109/01', 42 *CMLRev* 1 (2005), 231.
[59] Case C-109/01, *supra* note 54, para. 50.

In *Commission v Spain*, decided a year after *Akrich*, the ECJ reaffirmed its ruling in *MRAX* that the right of entry into the territory of TCN spouse of an EU citizen derives from the family relationship alone.[60] In this case Spain was condemned for imposing formalities upon the TCN spouses of EU citizens before being able to obtain a residence permit. The ECJ followed AG Stix-Hackl in her opinion that the fact that Community visa rules apply only to short-term visas does not mean that Member States may require immigration visas for the entry of nationals of non-Member States who are married to Community nationals.[61]

In another case of *Commission v Spain* the ECJ once again referred to its case law in *MRAX*.[62] In this case two TCNs were refused entry into Spain, on the basis of a notification in the Schengen Information System (SIS). The ECJ stated that Member States may, where an EU national travels *within the Community* in order to exercise his/her right of free movement require an entry visa for his/her TCN spouse, but that they must accord every facility for obtaining the necessary visa.[63] It then went on to state that it was clear that the TCNs derived from their status as spouses of an EU citizen the right to enter the territory of the Member States or to obtain a visa for that purpose, notwithstanding the fact that one of them had been travelling to Spain on an incoming flight from Algeria.[64] The facts of this case do not mention whether the TCNs in question were legally resident in the EU.

In the *Cikotic* case, the ECJ gave a very narrow interpretation of the right of free movement of a TCN spouse.[65] Mr. Cikotic, a TCN who lived with his EU spouse of Luxemburg nationality in Belgium, was refused a work permit in Luxemburg. The Court held that this was permitted as the right to pursue employed activity could be relied upon only in the Member State where the Community national pursues an activity as a worker of self-employed person.[66] Although the formulation of the present Article 23 of Directive 2004/38/EEC seems to corroborate the ECJ's interpretation, this case underlines once more the fundamental distinction

[60] Case C-157/03, *Commission v Spain* [2005] ECR I-2911, para. 28.
[61] Opinion of AG Stix-Hackl in Case C-157/03, *Commission v Spain* [2005] ECR I-2911, delivered 9 November 2004, para. 35.
[62] Case C-503/03, *Commission v Spain* [2006] ECR I-01097.
[63] *Ibid*., para. 41.
[64] *Ibid.*, para. 42. Reference to *Akrich* is made in passing only, in para. 47, in relation to the right to family life. In *MRAX*, the ECJ at one occasion speaks about entering Community territory, which seems to imply entry from outside: Case C-459/99, *supra* note 30, para. 57.
[65] Case C-10/05, *Cikotic* [2005] ECR I-03145.
[66] *Ibid*., para. 24.

between EU citizens and TCNs.[67] Considering that this case revolved around the right to work under the Directive, rather than the right of exit and entry, the question poses itself whether a similar reading of the right of entry would be justified. Although within the Schengen area such unlikely interpretation would be of limited practical relevance, the absurd result thereof would be that a TCN who is not in possession of a residence card could be barred from entering a Member State different from the one in which the EU spouse is exercising his/her rights of free movement.[68]

In the *Jia* case, the ECJ had the opportunity to clarify the ambiguity in its case law and end the confusion regarding the scope of Member States' competence in relation to admitting TCN who are family members of EU nationals who have exercised their right of free movement.[69] In this case Mrs. Jia, the Chinese mother in law of a German national living in Sweden, requested a residence permit while visiting her relatives in Sweden on a Schengen short term visa, on the basis of dependence on and family ties with the EU citizen. The application was rejected and in appeal proceedings the question was raised whether the *Akrich* case law contained a rule of general application that the rights of a TCN family member come into being only when that TCN is lawfully resident in a Member State under national legislation.

With Sweden, Slovakia and the Commission answering this question in the negative and the Netherlands and the United Kingdom taking the opposite view, AG Geelhoed seemed determined to clarify matters once and for all.[70] In his opinion to the case, he first of all pointed out that as Community law stands, the Member States retain competence in most aspects of immigration legislation and in particular of first entry to the territory by TCNs according to criteria laid down in their national legislation.[71] AG Geelhoed added that the regulation of immigration at the external borders, to the extent that harmonisation has not been achieved under Title IV EC, remains a competence of the Member States.[72] In his view, to accept that TCNs could join their EU citizen spouse without intervention of the home Member State, makes it possible to circumvent national immigration laws and would undermine the Member States'

[67] Article 23 of Directive 2004/38/EC, *supra* note 5, reads: [i]rrespective of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment *there*. Emphasis added.
[68] Article 5(2), Directive 2004/38/EC, *supra* note 5.
[69] Case C-1/05, *Jia*, *supra* note 26.
[70] Opinion in Case C-1/05, *supra* note 1, para. 52.
[71] *Ibid*., paras. 32-33.
[72] *Ibid*., para. 64.

powers in respect of controlling immigration at their external borders.[73] The rules on free movement should not be interpreted so as to allow for "*ex post facto* family reunification."[74]

AG Geelhoed added that the rationale behind the right for a TCN to join his/her EU citizen spouse is that of not dissuading the EU citizen from using his/her free movement rights. However, where the TCN did not have a right of residence in the home Member State in the first place, moving to another Member State could entail the loss of that right.[75] Holding that legal residence forms a prerequisite of the free movement rights of TCN family members would put an end to a situation of reverse discrimination such as was the case in *Morson and Jhanjan*[76] and dissuade abuse of the type that was at the basis of the *Akrich* case.[77]

In his opinion in the *Akrich* case, AG Geelhoed had already argued that the Court's ruling in Singh did not "create a right in favour of the national of a non-Member State to enter the territory of the European Union." In that opinion however he concluded that a Member State of which the worker is a national may only rely on an "overriding national interest" when refusing entry to a TCN spouse who had not been admitted to the EU in accordance with the immigration laws of a Member State. His opinion in *Jia* went further and, were the Court to have followed his line of reasoning, it would have certainly have brought legal certainty: *lex dura sed lex*. The result would have been that a TCN family member of an EU citizen would have only been able to rely upon the rights (s)he derives from the status of the EU citizen, where his/her first entry to EU territory had been legal. This first entry then would not have been automatic upon production of a valid passport or identity card and the required visa. It would have been the Member State's national immigration laws that would determine whether and under what conditions the TCN spouse was to be admitted.

A few remarks need to be made. First of all, the reference to the Member State's powers over the control of the external borders is not entirely convincing. Even if dealing with "separate spheres of competence," national competences remain subject to the Community rules on free movement and the principle of supremacy.[78] This is also evidenced by the Schengen Borders

[73] *Ibid*., para. 67.
[74] *Ibid*., para. 70.
[75] *Ibid*., para. 71. Cf. the Court's reasoning in Case C-109/01, *supra* note 54, para. 53.
[76] Joined Cases 35/82 and 36/82, *supra* note 52.
[77] Opinion in Case C-1/05, *supra* note 1, paras. 74-75.
[78] *Ibid*., para. 35.

Code (SBC), which in Article 7(2) clearly states that the rules contained therein leave unaffected the rights of free movement on the basis of Community law.[79]

One could moreover imagine a situation in which an EU citizen is indeed dissuaded from using its free movement rights when a legal residence is required, namely in the case where under the rules of the home Member State a residence permit would be granted, but the EU citizen has already taken up residence in another EU Member State. Would that EU citizen then have to move back or delay her departure for another Member State in order to establish legal residence for her TCN spouse first?

Lastly, as regards the argument of preventing abuse, it has been consistently held in the case law that the motives of the EU citizen for relying on the free movement provisions of the Treaty are of no relevance as regards his/her right to enter and reside in another Member state as long as the activity pursued there is effective and genuine.[80] Indeed, in his opinion in the *Akrich* case AG Geelhoed had recalled that the intentions of the EU worker and his/her spouse are immaterial, which was also reiterated by the Court.[81] Moreover, neither the AG, nor the Court questioned the genuine nature of the marriage of Mr. and Mrs. Akrich.[82]

In January 2007, the Grand Chamber of the ECJ delivered its judgment. The Court appeared to be at pains to avoid giving any general restatement of the law. It recalled the situation of the *Akrich* case, after which it distinguished that from the facts in the case at hand.[83] It ruled that, as Mrs. Jia was legally present in Sweden when submitting her application, the condition of previous legal residence as formulated in *Akrich* could not be made applicable to her situation.[84] Therefore, the Court continued, Community law does not require Member States to make the grant of a residence permit to TCN family members subject to the condition of residing lawfully in another Member State.[85]

This judgment left much to be desired in terms of adding clarity to the case law on the position of TCN family members. By distinguishing the facts from those in *Akrich*, the Court chose not to overrule the case. However, the question of to what extent *Akrich* had to be confined

[79] Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006, L105/1.
[80] Case 53/81 *Levin* [1982] ECR 1035, para. 23.
[81] Opinion AG Geelhoed in Case C-109/01, *Akrich* [2003] ECR I-9607, delivered 27 February 2003, para. 159 and 186. Case C-109/01, *supra* note 54, para. 55 and the case law cited therein.
[82] Opinion in Case C-109/01, *ibid*., para. 163. Case C-109/01, *supra* note 54, para. 57.
[83] Case C-1/05, *Jia*, *supra* note 26, paras. 28-31.
[84] *Ibid*., para. 32
[85] *Ibid*., para. 33.

to its particular facts remained, in particular since the ECJ in *Jia* did seem to imply that there was a requirement of legal entry into the EU.[86]

In the absence of a straightforward clarification by the ECJ on the right of Community workers to be joined by their TCN family members, similar questions continued to reappear before the Court.[87] In Case C-291/07, *Eind* the Court was asked whether a Dutch national, Mr. Eind, who had worked in the UK, was allowed to be accompanied by his Surinamese daughter, Ms. Eind, upon return to the Netherlands, despite the fact that his daughter did not have a previous right of residence in the Netherlands and that Mr. Eind himself was no longer economically active.[88]

In many ways *Eind* formed a re-enactment of *Jia*. The intervening Member States reiterated that in their view denying a right of residence to Ms. Eind would not be capable of discouraging Mr. Eind to use his right of free movement, since his daughter did not have right of residence in the Netherlands in the first place. Contrary to the facts stated by the referring Court, the UK government argued that Ms. Eind had been given a right of residence in the UK on the basis of national law, rather than Community law, which could be read as an attempt to strip the case of its Community law dimension.[89]

The Court held that the right of a Community worker to return to his home Member State could not be considered as purely internal.[90] The fact that Mr. Eind was no longer economically active did not change anything in this regard as he was a national of the Netherlands and consequently had an unconditional right to return to that Member State.[91] In *Jia* the Court had already ruled that once the TCN family member is legally present in the host Member State, previous legal residence could not be made a requirement.[92] The Court, without referring to *Jia*, confirmed this rule in stating that the fact that Ms. Eind did not have a previous right of residence in the home Member State of the EU citizen did not affect its findings.[93]

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[86] *Ibid*., para. 31: "it is not alleged that the family member in question was residing unlawfully in a Member State or that she was seeking to evade national immigration legislation illicitly."
[87] Case C-551/07, *Sahin* [2008] ECR I-0000, *nyr*. raised similar questions. After the Court's ruling in *Metock* (Case 127/08, *supra* note 11, see discussion below) the ECJ gave its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure.
[88] Case C-291/05, *Eind* [2007] ECR I-10719.
[89] The Court, in line with the procedure established by Article 234, decided the case upon the facts as put before it by the referring Court, *ibid*, para. 18.
[90] *Ibid*, para. 37.
[91] *Ibid*, paras 30-31, 38 and 35.
[92] Case C-1/05, *Jia*, *supra* note 26, paras. 32.
[93] Case C-291/05, *Eind*, *supra* note 88, para. 41.

In *Eind* the Court clearly overruled its judgment in *Akrich*, even if it did not do so explicitly.[94] The Court essentially argued that, since Mr. Eind's was given the right to be joined by his daughter in the UK on the basis of Community law, withdrawing that right upon return would deter him from going back to his home Member State, as such impeding the use of his right of free movement of persons. Although, as argued above, a requirement of previous legal residence could amount to a restriction of the freedom of movement of persons, there is something artificial about the Court's reasoning. One could imagine that the Court's reasoning was informed by its wish to respect Mr. Eind's right to family life, without however referring to this right explicitly.[95]

The ECJ's ruling in *Eind* made it clear that the right of an EU citizen to be joined by his/her TCN family member in another Member State than his/her own cannot be made dependent upon legal residence in the home Member State, *where the TCN family member is legally present in the host Member State*. However, the question that remained was how *Eind* related to the ECJ's ruling in *MRAX*. Could a Member State refuse entry to a TCN family member at the border upon arrival from outside the EU?

The Court gave a definitive answer in July 2008 in the *Metock* case.[96] The Irish High Court had asked for a preliminary ruling in four cases in which a residence card was refused to the TCN spouses of EU citizens established in Ireland. In each case the TCN spouse had entered Ireland asking for asylum which had been refused. The High Court asked once more whether the right for an EU citizen to be accompanied in the host Member State by his TCN spouse was dependent on a requirement of prior residence. In addition it asked whether the place and time of the marriage and the circumstances in which the spouse had entered the host Member State were of influence.

There could have been an easy way out for the Court in arguing that since the applicants in the national proceedings had not entered Ireland illegally, their situation was comparable to that of Mrs. Jia and Ms. Eind. It rather decided to consider the underlying question of whether the EU citizen's right to be accompanied by a TCN family member includes a right to enter the territory of the EU. In view of the sensitive nature of the question at hand, touching upon EU

[94] Case C-109/01, *Akrich* [2003] ECR I-9607, paras. 53-54.
[95] *Ibid*, para. 36
[96] Case C-127/08, *supra* note 11.

citizens' rights, as well as the sovereign prerogative to decide to whom to allow entry to their territory, it is not surprising that a total of ten Member States intervened.[97]

The Court gave a broad interpretation of the right contained in Article 5(2) of Directive 2004/38/EC and explicitly reconsidered its ruling in *Akrich*.[98] It held that its previous case law in *MRAX* and Case C-157/03 (*Commission v Spain*), which had interpreted the right of TCN family members under Article 10 of Regulation (EC) No 1612/68, applied *a fortiori* to the new Directive 2004/38/EC, since this Directive aimed to "strengthen the right of free movement and residence of all Union citizens."[99]

That fact that Article 5(2) requires either a visa or a valid residence card for those TCNs from countries that are on the visa list of Regulation (EC) No 539/2001, implies that the Directive does not require prior legal residence. Also Article 10(2) of the Directive, which gives an exhaustive list of documents which a TCN family member of an EU citizen may have to present to the host Member State in order to obtain a residence card issued, does not include documents demonstrating prior lawful residence in another Member State.[100]

So far, the Court gave a perfectly valid construction of secondary legislation. However, it did not stop there and felt it had to support its conclusion with reference to the right to family life and the free movement of persons. It argued that the Community legislature recognised the importance of the right to family in removing obstacles to the free movement of persons.[101]

The Court, following the view of AG Poiares Maduro, argued that if it were to be left to the national migration laws of the Member State whether or not prior legal residence constituted a requirement, these provisions could differ depending on the Member States, which would be incompatible with the objective set out in Article 3(1)(c) EC of creating an internal market.[102] This reasoning does not however convincingly rebut the argument that where there is no right for

[97] It is not clear from the judgment which viewpoint was taken by which Member States. It should be noted however that some Member States already granted the right of first entry to their territory to the TCN family member of an EU citizen, irrespective of prior legal residence. The Court dealt with the case under the new accelerated procedure provided for in Article 104a of the Court's Rules of Procedure. Although the questions at hand were anything but new, one can still understand the Court's decision to act swiftly, in view of the legal uncertainty in which the persons concerned found themselves and the possibility of return decisions being issued in the mean time. See for a critical note on the use of this procedure in this case: Chalmers, D., 'The Secret Delivery of Justice', 33 *ELRev* 6 (2008), 774.
[98] Case C-127/08, *supra* note 11, para. 58.
[99] *Ibid*., paras. 58 and 59.
[100] *Ibid*., paras 52 and 53.
[101] *Ibid*., para. 56.
[102] *Ibid*., paras 67 and 68. View of AG Poiares Maduro in Case C-127/08, *Metock* [2008] ECR I-0000, *nyr*, delivered on 11 June 2008, para. 9.

the EU citizen to be joined by his/her spouse in the first place, there can be no question of an obstacle to this right. The setting of more favourable standards by individual Member States does not of itself have to constitute an obstacle to the functioning of the internal market.

The ECJ reasoned that requiring previous legal residence would lead to the paradoxical outcome that a Member State would be obliged, under the Council Directive on the right to family reunification, to authorise the entry and residence of a TCN spouse of a TCN lawfully resident in its territory where that spouse is not already lawfully resident in another Member State, but would be free to refuse the entry and residence of the spouse of an EU citizen in the same situation.[103] Here the Court ignored the fact that the Directive on family reunification does not apply to a number of Member States, including Ireland, showing how its argument of an internal market without obstacles to free movement relates exclusively to those who can claim the Community right of free movement.

Having accepted that prior legal residence cannot be required, the Court replied to the second question that it was irrelevant whether the marriage was concluded before or after the TCN entered the host Member State. Since the Directive states that an EU citizen can be joined by his/her TCN family member, the legislator implicitly accepted the possibility that a family would be founded only after the exercise of the right of freedom of movement.[104] Moreover, the refusal of a right of residence could discourage the EU citizen from continuing to reside in that Member State.[105] For the same reason it makes no difference whether the TCN has entered the host Member State before or after becoming a family member of the EU citizen.[106]

Both the AG and the Court rejected in clear terms the argument that Member States retain exclusive competence, subject to Title IV EC, to regulate the first access to Community territory of TCN family members of a EU citizens. AG Maduro rightly pointed out that the Court had held on earlier occasions that the free movement provisions may have the effect of limiting the Member States' exercise of their powers, including those in relation to immigration control.[107] The Court stated that the Community's competence to legislate on the basis of the free movement

[103] Article 4(1)(a), Council Directive 2003/86/EC on the right to family reunification, *OJ* 2003, L 251/12.
[104] Case C-127/08, *supra* note 11, paras 87 and 88.
[105] *Ibid*., para. 89.
[106] *Ibid*., para. 92.
[107] View of AG Poiares Maduro, *supra* note 102, para. 6.

provisions the entry and residence of TCN family members of EU citizens, also includes the situation in which family members are not already lawfully resident in another Member State.[108]

The Court, like the AG, added that Directive 2004/38/EC does not deprive Member States of their power to control entry into their territory pointing at the public policy, public security or public health exception and noted Article 35 of the Directive which states that in the case of an abuse of rights or fraud, such as a marriage of convenience, the Member States may adopt measures to refuse, terminate or withdraw the right conferred by the Directive.[109]

Interestingly, the AG argued that Article 35 could also cover the *Akrich* case of seeking to evade national immigration legislation illicitly.[110] Indeed, the AG did not seem to have proposed that the Court overrule *Akrich*, but rather to deny it a general scope of application.[111] In view of the Court's judgment it would however be difficult to envisage a situation in which the illicit evasion of immigration laws could lead to a restriction of the right of an EU national to be joined by his/her TCN family member. Since the motive for which an EU national decides to use his/her free movement rights is of no importance as long as the activity is effective and genuine, and as long as the family tie is a genuine one, there will be no room for the Member State to bar entry on the basis of an abuse of rights. The Member State remains however free to impose proportional penalties for acting in breach of the national rules on immigration.[112]

It may come as no surprise that in a number of Member States the *Metock* judgment was received with great concern. This was particularly the case in countries such as the Netherlands and Denmark, which as part of their integration policy have made "marriage immigration" more difficult by imposing language, age and income requirements where there nationals wish to bring over their TCN spouse. These requirements can now be avoided if the EU national decides to use his/her free movement rights, without that constituting an abuse of Community law.[113] Other Member States, such as the UK and Italy feared the judgement was an invitation for "sham marriages" and irregular migration.

It is interesting that while in the normal situation of a genuine economic activity in combination with a genuine family link, it is hard to find any abuse of Community law, the JHA

[108] Case C-127/08, *supra* note 11, para. 65.
[109] *Ibid*., paras 74-75.
[110] View of AG Poiares Maduro, *supra* note 102, para. 14.
[111] *Ibid*., para. 11.
[112] Case C-127/08, *supra* note 11, para. 97.
[113] 'Denen boos op EU-hof in geschil over immigratie' (*NRC Handelsblad*, 6 August 2008); 'Albayrak pakt België-route aan' (*Trouw*, 27 januari 2009).

Council Conclusions of 27-28 November 2008 referring to the *Metock* judgement were framed once more in terms of abuses and misuses. The Conclusions stated that every effort had to be made "to prevent and combat any misuses and abuses, as well as actions of a criminal nature, with forceful and proportionate measures with due regard to the applicable law (…)."[114] The Commission was asked to publish guidelines for the interpretation of the Directive and to consider all other appropriate and necessary proposals and measures.[115] It did not however ask the Commission to come forward with specific legislative proposals reversing the *Metock* judgment.

One year after *Metock*, those Member States that did not already act in compliance with the judgment, seem to have changed their administrative practices accordingly.[116] While some will laud the Court for strengthening the right of free movement, others will read in the judgment as undue judicial activism. Although the Court was correct in its interpretation of the Directive, it should be emphasised that the judgment affects only a very limited number of TCNs and that the Court did not depart in any way from construing their rights as derived from those of the EU citizen. Therefore, although the Member States have lost part of their power to decide upon who to allow to enter their territory, this is only a very limited loss.

3.2 Third Country Nationals from the EEA Countries and Switzerland

As was discussed in Chapter IV, free movement rights have been extended to nationals from the EFTA countries through the EEA Agreement and the EC/Switzerland Agreement on the free movement of persons. A special regime for Liechtenstein stipulates that this country, taking into account its seize, may limit the annual inflow of EEA citizens in terms of residence permits it issues.[117] This does not however affect the right of entry and exit of EU/EEA citizens.

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[114] Note that the draft Council Conclusions as proposed by the UK government (Council Document 15903/08) indicated a much stronger intention "to amend or re-interpret EC legislation at the dictat of interior ministries, without applying any form of legislative process": Peers, S., 'The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms' (Statewatch Analysis, 2008).

[115] The 'Guidelines on free movement and residence rights of EU citizens and their families' were adopted on 2 July 2009, not yet published.

[116] For instance, the UK "Guidance on the application of the Immigration (European Economic Area) Regulations 2006" has been updated in line with the judgment.

[117] See Annex V and Annex VIII to the EEA Agreement.

In principle, the EEA agreement and the agreement on the free movement of persons with Switzerland are instruments of public international law. Their effect depends on the status of public international law in the domestic legal order of these countries. The ECJ's doctrines of direct effect and supremacy do not automatically apply, which may raise difficulties in relation to Iceland and Norway, which are both dualist.[118]

The EFTA court has not attributed direct effect to the EEA agreement, but it has declared that the state is liable to provide for compensation for loss and damage caused to individuals by breaches of the obligation under the EEA Agreement to provide for the supremacy of the EEA Agreement under national law.[119] The Court of First Instance (CFI) has attributed direct effect to provisions of the EEA in line with the ECJ's case law that "a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects to the adoption of any subsequent measure."[120]

Although Article 18 EC on EU citizenship does not apply to the EEA countries or Switzerland, the Directive has been incorporated in the EEA Agreement.[121] Pending the fulfilment of constitutional requirements by Norway it is not yet applicable.[122] The rights and obligations laid down in Directive 2004/38/EC will thus apply also to EEA citizens. The directive does not apply to Switzerland, for which the free movement rights are laid down in Annex I to the EC-Switzerland agreement on the free movement of persons.[123]

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[118] Graver, H, 'Supranationality and National Legal Autonomy in the EEA-agreement (Oslo, ARENA Working Paper 00/23, 15 October 2000).

[119] See Case E-1/94, *Restamark* [1994-1995] EFTA Court Report, 15, para. 77 and Case E-9/97, *Sveinbjörnsdóttir* [1998] EFTA Court Report 95, para. 62.

[120] Case 12/86, *Demirel* [1987] ECR 3791, para. 14. See earlier: Case 87/75, *Bresciani* [1976] ECR 129, para. 25 and Case 104/81, *Kupferberg* [1982] ECR 3641, para. 23; Case T-115/94, *Opel Austria* [1997] ECR II-2739, para. 102. The Court as early as 1973 accorded direct effect to Article 39 EC, see: Case 167/73, *Commission v France* [1974] ECR 359, para. 35 and Case 41/74, *Van Duyn* [1974] ECR 1337, para. 8.

[121] Decision of the EEA Joint Committee No 158/2007 of 7 December 2007, on the basis of Article 98, EEA Agreement.

[122] COM(2008) 840 final, *supra* note 22, 3.

[123] Agreement between the EC and its Member States, of the one part, and Switzerland, of the other, on the free movement of persons, *OJ* 2002, L114/6.

3.3 Third Country Nationals covered by Association Agreements

Article 310 EC states that the Community may conclude agreements with third countries or international organisations establishing an association involving reciprocal rights and obligations. The EEA Agreement and the Swiss/EC Agreement are not the only association agreements that include rights of free movement. The EEC/Turkey Agreement, signed in 1963, referred to the possibility of granting free movement to Turkish nationals, although these provisions have never been implemented.[124] The Agreement and its implementing decisions do however confer important rights on migrant Turkish workers, although only those who have already been admitted to a Member State.[125]

It is settled case law of the ECJ under the provisions of the Turkey/EEC Association Agreement that Member States retain the power to regulate the entry of Turkish nationals to their territory, as well as the conditions under which they may take up first employment.[126] The Court furthermore held that unlike nationals of Member States, Turkish workers are not entitled to move freely within the Community but benefit only from certain rights in the host Member State whose territory they have lawfully entered and where they have been in legal employment for a specific period. Moreover, there is no initial right of entry to family members of Turkish workers.[127]

The same applies to the Europe Agreements which were concluded with the Central and Eastern European Countries before their accession to the EU. Here again important and directly effective rights were conferred upon TCN workers, yet only on those that were already admitted to a Member State.[128] The so-called Stability and Association Agreements (SAA) that are currently being concluded with the countries of the western Balkan are similar in content and aim to the Europe Agreements and the EEC/Turkey Agreement.

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[124] EEC-Turkey Agreement ("Ankara Agreement"), *OJ* 1964, L217/3687. See: Melis, B., *Negotiating Europe's Immigration Frontiers* (The Hague, Kluwer Law International, 2001), 68.

[125] See on the direct effect of the non-discrimination principle contained in Article 3(1) of Decision No 3/80 of the Association Council on the application of the social security schemes of the Member States of the European Communities to Turkish workers and members of their families, *OJ* 1983, C110/60: Case C-262/96, *Sürül* [1999] ECR I-2685, para. 74.

[126] See *i.a.*: Case C-37/98, *Savas* [2000] ECR I-2927, para. 58.

[127] See Case C-275/02, *Ayaz* [2004] ECR I-8765, paras. 34 and 35 and Case C-325/05, *Derin* [2007], ECR I-6495, para. 64.

[128] With the entry of Romania and Bulgaria to the EU, the last of these Europe Agreements have been superseded by the provisions of the EU/EC Treaties.

The Europe Agreements, the EEC/Turkey Agreement and the SAA all contain provisions on the freedom to provide services and the freedom of establishment. The ECJ, applying the principle from the *Royer* case, has held that a right of entry and stay are the necessary corollaries of these freedoms.[129] Since however the Association Agreements are merely intended to create a framework for these countries gradual integration into the Community, the freedom to provide services and the freedom to provide establishment cannot merely because of a similar wording be given the same interpretation as under the Treaties.[130] Therefore these rights are not absolute and their exercise may be limited by the rules of the host Member State regarding entry, stay and establishment.[131] The Court did hold that these freedoms must be extended, as far as possible, to eliminate restrictions on the freedom to provide services between contracting parties.[132] Moreover, the power of the host Member State to apply its domestic rules regarding entry, stay and establishment of natural persons is expressly subject to the condition that it does not impair the benefits accruing under these agreements.[133]

Important rights may also flow from the directly effective standstill clauses in these agreements. Article 41 Paragraph 1 of the Additional Protocol to the Turkey/EEC Agreement provides that: "Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services."[134] The Court in its recent *Soysal* judgment decided that the imposition of a visa requirement, in this case a Schengen visa on the basis of Regulation (EC) No 539/2001, constitutes such a restriction where a visa was not required on the date of entry into force of the Protocol, 1 January 1973.[135] The Court reiterated that even if the standstill clause was not capable of conferring on Turkish nationals a right of establishment or, as a corollary, a right of residence, nor a right to freedom to provide services or to enter the territory of a Member State, it did prohibit making the exercise of those economic freedoms on the territory of that Member State subject to stricter conditions than those which applied at the time of entry into force of the Additional Protocol *with regard to the*

[129] Case 48/75, *Royer* [1976] ECR 497, paras. 31-32. See for instance Case C-37/98, *Savas* [2000] ECR I-2927, paras 60 and 63, Case C-257/99, *Barkoci and Malik* [2001] ECR I-6557, para. 50, Case C-235/99, *Kondova*, [2001] ECR I-6427, para. 50, Case C-63/99, *Gloszczuk* [2001] ECR I-6369, para. 47.
[130] See *inter alia* Case C-257/99, *ibid.*, paras. 51-52 and the case law cited therein.
[131] See *inter alia* Case C-257/99, *ibid.*, para. 54.
[132] Joined Cases C-317/01 and C-369/01, *Abatay and Sahin* [2001] ECR I-12301, para. 112.
[133] See *inter alia* Case C-257/99, *supra* note 129, para. 57.
[134] Additional Protocol to the Ankara Agreement, *OJ* 1972, L293/1.
[135] Case C-228/06, *Soysal* [2009] ECR I-0000, *nyr*.

Member State concerned.[136] This is because a visa requirement is likely to interfere with the exercise of the freedom to provide services, "in particular because of the additional and recurrent administrative and financial burdens involved in obtaining such a permit which is valid for a limited time."[137]

If one is to interpret the freedom of services as the Court has done under the EC Treaty, including the receipt of services, the *Soysal* judgement must mean that a visa requirement cannot be imposed by those Member States that did not impose it at the time of entry into force of the Additional Protocol, or - the case of Member States that acceded to the EU afterwards - from the moment the Protocol came into effect in relation to these Member States. It means that the general visa obligation for Turkish nationals has become a patchwork obligation, which in view of the borderless Schengen area will be difficult to maintain. The absence of a visa requirement does not however mean an automatic right of entry. At the Community's external borders, Schengen Member States may still apply the SBC and the UK and Ireland their national rules, in order to see whether the Turkish national fulfils other requirements for entry. Of course these other requirements will also have to comply with the standstill obligation.

A possible extension of the free movement rights was initially foreseen under the European Neighbourhood Policy (ENP). The ENP was first outlined in the Commission Communication on Wider Europe, followed by the Strategy Paper on the ENP.[138] In line with the security objective of "promoting a ring of well governed countries" around the EU, the ENP set the goal of creating a "ring of friends" around the EU, focussing on both the southern and eastern neighbours.[139] The countries falling under the ENP do not (yet) have the prospect of EU Membership, but the Commission's Communication on the Wider Neighbourhood does not explicitly exclude this possibility for countries such as Ukraine and Moldova.[140] The ENP intended to create partnership by offering the ENP countries a share in the internal market without (immediate) membership of the EU.

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[136] *Ibid*., para. 47 and the case law cited therein.
[137] *Ibid*., para. 55.
[138] COM(2003) 104 final, Commission Communication, Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours and COM(2004) 373 final, Commission Communication on the European Neighbourhood Policy - Strategy Paper.
[139] 'A Secure Europe in a better world - The European Security Strategy', adopted by the European Council in Brussels, 12 December 2003, 8; COM(2003) 104 final, *ibid*., 4.
[140] COM(2003) 104 final, *ibid.*, 4-5.

The Commission in its Wider Europe Communication stated that free movement of people and labour could be a possible long-term objective.[141] In the Communication on the ENP a year later its tone is already more careful: the goal should be to facilitate movement of persons, whilst maintaining or improving a high level of security.[142] In practice the (limited) free movement of persons has become a means, rather than an objective, which is shown for instance between the direct link between visa facilitation on the one hand and increased border controls and readmission agreements on the other. The Commission in its 2006 Communication on "Strengthening the European Neighbourhood Policy" admitted that "an enhanced ENP (…) require[s] a very serious examination of how visa procedures can be made less of an obstacle to legitimate travel from neighbouring countries to the EU (and vice versa)." It then however immediately linked this possibility of facilitated travel to cooperation on migration control, border management and readmissions agreements. The initial promise by Romano Prodi of "everything but institutions" seems to have been long forgotten.[143]

4. Free Movement Rights of Third Country Nationals under Title IV EC

Article 63(3)(a) EC gives the Community the power to legislate measures on immigration policy as regards the conditions of entry and residence. This legal basis has been used by the Community legislator to grant certain categories of TCNs independent, albeit very limited, free movement rights.[144] It should emphasized that this legislation is adopted under Title IV EC, not on the basis of the free movement provisions of the Treaty. Therefore it is subject to provisions of the Protocols attached to the Treaty of Amsterdam on the position of the UK and Ireland, and the position of Denmark.[145]

So far five directives that are of relevance for our discussion have been adopted. The first regulates the status of a TNC who has lived regularly and continuously for a minimum of five

[141] COM(2003) 104 final, *supra* note 138, 10.
[142] COM(2004) 373 final, *supra* note 138, 17.
[143] Speech by former Commission President Romano Prodi, 'A Wider Europe - A Proximity Policy as the key to stability' (Brussels, Sixth ECSA-World Conference, Brussels, 5-6 December 2002), SPEECH/02/619.
[144] See on the relation between this secondary legislation and the Association Agreements discussed above: Peers, S., 'EU Migration Law and Association Agreements', in: Martenczuk, B. and Van Thiel, S. (Eds), *Justice, Liberty and Security: New Challenges for EU External Relations* (Brussels, ASP/VUB Press, 2009), 53-88.
[145] Note that Article 4 of the Protocol on the position of the UK and Ireland allows these Member States to opt-in to legislation adopted under Title IV. Only in one case, the Directive on Researchers, has Ireland opted in.

years in a Member State, granting him/her the status of long term residents (LTR).[146] The second provides for a minimum harmonization of the rules on family reunification.[147] Two directives regulate the admission, understood as the entry and residence, of students and scientific researchers.[148] A final directive has been adopted in the framework of the Commission's policy plan on legal migration: the Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.[149] A proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State is still pending.[150] Two further proposals that were announced in the Commission's policy plan on legal migration, on seasonal workers and Intra-Corporate Transferees, have not yet been tabled.[151]

Although the LTR's Directive aims to bring the position of the LTR closer to that of the EU citizen, it far from gives the LTR the same free movement rights. Under Article 5 of the Directive, a LTR has a right of residence in other Member States for more than 3 months, on the condition that s/he has stable and regular resources which are sufficient to maintain him/herself and the members of his/her family, without recourse to the social assistance of the Member State concerned. A LTR is allowed to be joined by his spouse and minor children, but only where the family was already constituted in the first Member State.[152]

The Directive is silent on the right of entry into the Member State. However, it seems clear that a right of residence cannot be effective without an accompanying right of entry.[153] Interestingly, the LTR Directive also does not explicitly grant LTRs a right of free movement

[146] Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, *OJ* 2003, L16/44.
[147] Council Directive 2003/86/EC, *supra* note 103.
[148] Council Directive 2005/71/EC, on a specific procedure for admitting third-country nationals for the purposes of scientific research, *OJ* 2005, L289/15 and Council Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, *OJ* 2004, L 375/12.
[149] Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ* 2009, L155/17 ("Blue Card Directive").
[150] COM(2007) 638 final, Commission Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.
[151] COM(2005) 669 final, Commission Communication, Policy Plan on Legal Migration.
[152] Article 16, Council Directive 2003/109/EC, *supra* note 146.
[153] Compare in this respect Case 48/75, *supra* note 129.

within the Community for periods not exceeding three months. One could argue that a right of entry and stay for periods not exceeding three months is implied in Article 5, although it is worth noting that a proposal that would have explicitly allowed for free movement of LTR for periods of less than six months was never adopted and eventually withdrawn by the Commission.[154] It is true that within a borderless Schengen area the absence of such a right would not be too problematic, but it might become so in the case of a LTR who wants to visit a part of the Community in which the Schengen *acquis* is not yet applicable.[155] A residence permit of one of the Member States would substitute a visa requirement under the rules of the SBC, but would not automatically imply a right of entry.[156]

The directives that harmonise the conditions for the entry of TCNs in the context of family reunification, students and researchers all grant rights of entry and residence in relation to the territory of a single Member State. At most, in the case of researchers, research may be carried out for a period not exceeding three moths in a second Member State.

A different approach can be seen in the Blue Card Directive. Recital 14 of the Directive states that TCNs who are in possession of a valid travel document and an EU Blue Card issued by a Member State applying the Schengen *acquis* in full, should be allowed to enter into and move freely within the territory of another Member State applying the Schengen *acquis* in full, for a period of up to three months. It is interesting however that this right of free movement, presumably including a right to enter through the territory of the other Member States by crossing an external border, is linked to the territory in which the Schengen *acquis* is fully applied, rather than to the territory of the Member States in which the Directive applies. Presumably an amendment of the SBC is required to allow for such a right to become effective. Moreover, in the operative part of the Directive, Article 7(4)(a) refers only to the right to re-enter and stay in relation to the Member State issuing the Blue Card.

The Commission proposal for a directive that would introduce a single application procedure and a single residence and work permit, also stated in recital 8 that there would be a

[154] COM(2001) 388 final, Commission Proposal for a Council Directive relating to the conditions in which third-country nationals shall have the freedom to travel in the territory of the Member States for periods not exceeding three months, introducing a specific travel authorisation and determining the conditions of entry and movement for periods not exceeding six months.
[155] Not that in non-Schengen Member States UK and Ireland, the LTR Directive does not apply in any case.
[156] Article 5(1)(b), SBC.

right of free movement for a period not exceeding three months in the territory of the Member States applying the Schengen *acquis* in full. However, in Article 11 of the proposal, this right seems limited to a right to (re)-enter and stay in the issuing Member State, and a right of passage through other Member States. While the explanatory memorandum explicitly mentioned that the right contained in Article 11 were of particular relevance in those Member States which do not apply the Schengen *acquis* in full, in a later draft the right of passage through other Member States has been deleted.[157] This shows once more Member States' reluctance to give up the power to decide who they wish to allow to enter and reside in their territory. Also interesting in this respect is the 'Returns Directive', which in Article 6(2) states that a TCN who is found to stay illegally on the territory of a Member State, but holds a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately.[158] However, when it comes to excluding TCNs from the common territory of the Member States, recital 14 of the Directive states that an entry ban issued in connection with a return decision should be given a "European dimension" by prohibiting entry and stay on the territory of all Member States. Indeed, Article 2(6) of the Directive defines an entry ban as applying to the territory of the Member States (plural).

It is interesting that the internal market logic that underpins the secondary legislation in the area of free movement of persons, is absent in the legislation on the position of TCN legal migrants. In this respect is should be questioned in how far the Court's case law on the free movement rights, can be transferred to the situation of a TCN with limited free movement rights under the directives adopted under Title IV EC. We would argue that the exceptions on the basis of public policy, public security and public health, which can be found in all of the adopted directives, should be interpreted in a similar manner as the exceptions to the right of free movement of EU citizens.[159] Support for this position can be found in the Tampere Conclusions,

[157] Council Document 8145/1/09.

[158] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals ("Returns Directive"), *OJ* 2008, L348/98.

[159] The Commission proposals for the LTR Directive still stated that these exceptions were largely drawn from the ECJ's case law on the exceptions to the provisions on free movement for EU citizens (COM(2001) 127 final, 19). The original proposal for the Family Reunification Directive also pointed out the similarity with the concept in the Community rules on free movement (COM(99) 638 final, 17). The proposals for the TCN Students and TCN Researchers Directives stated that decisions on the basis of the exceptions must relate exclusively to the personal conduct of the TCN and that regard must be had to the individual's specific situation and of the proportionality principle (COM(2002) 548 final, 17 and COM(2004) 178 final, 18). The proposal for the Blue Card Directive is silent on the interpretation of the exceptions (COM(2007) 637 final).

which called for the Community to approximate the legal status of long term resident TCNs to that of Member States' nationals.[160] Recital 2 of the LTR Directive makes explicit reference to these conclusions.[161] Likewise, where a TCN arrives at the external border without the requisite visa, but can nevertheless furnish evidence of for instance the authorization for family reunification and family ties with the sponsor, the Court's reasoning in *MRAX* should apply.

5. Conclusion

This chapter has highlighted and refined the dichotomy that exists in the way the EU's external border rules treat individuals presenting themselves at the external border, whether or not this border coincides with the Schengen external border. Since for the EU citizen the right of entry into another Member State is in principle independent from whether s/he enters the border of that Member State by passing an internal or external border, extensive attention has been paid to rules on crossing internal borders as well as the way in which these rules have been interpreted by the ECJ.

If we consider that the reinforcement of controls at the external border is often justified as a prerequisite of attaining internal free movement, as well as the Treaty objective of attaining an Area of Freedom, Security and Justice, a few remarks must be made.

First, the right of internal free movement is limited to EU citizens and a small number of TCNs of "privileged" status. The category of TCNs of such status consists of certain family members of the EU citizen, as well as nationals of countries with which the EC and its Member States have concluded agreements on the extension of the free movement of persons. Despite transitional arrangements for the nationals of the newly acceded Member States, their position of EU citizen and concomitant rights is unquestionable. This means that any enforcement of national rules which are allowed to remain in force during the transitional period cannot be enforced at the internal border.

Second, the derived nature of the free movement rights of TCN family members means that these rights are not only dependent on the EU citizen family member, but also that they are potentially more limited. This is particularly the case if the Court were to extend its ruling in the

[160] European Council Conclusions, Tampere, 15-16 October 1999, point 21.
[161] Peers, S., *EU Justice and Home Affairs Law* (Oxford, OUP, 2006), 221.

Cikotic case to the right of entry which would then be limited to the state in which the EU citizen exercises his/her free movement rights.

After a rather careful judgment in *Jia*, the Court in *Eind* ruled that there is no requirement of previous legal residence of the TCN family member in the home Member State of the EU national before s/he can invoke a derived right of free movement. While both *Jia* and *Eind* seemed to leave intact a requirement of legal entry into the EU, the Court in *Metock* finally removed all remaining doubt, explicitly overruling *Akrich*. Even though this judgment is limited to the narrow category of TCN family members of EU citizens, it does mean an important restriction on the right of the Member States over the access to their territory of TCNs.

Some categories of TCNs have independent free movement rights on the basis of association agreements of their country of nationality with the Community. This is the case for the EFTA countries. Association agreements with other third countries do confer important rights on the nationals of these countries, however only once admitted. Under Title IV EC the Community has the power to regulate the conditions of access for TCNs, possibly granting them independent free movement rights. As we have shown, these rights are however limited to specific categories of TCNs, such as qualified workers, and the approach taken is very much linked to admission to a single Member State's territory, evidencing the sensitivities of the Member States in relation to their power to decide who to allow to enter and stay in their territory. This approach however seems at odds with the existence of the borderless Schengen area, in as far as the right to enter and move freely for periods not exceeding three months is concerned.

VI. The Schengen Border Crossing Regime

1. Introduction

In the previous chapter we examined how the Community rules on free movement grant border crossing rights to EU citizens and certain categories of third country nationals (TCN). As such, these rules condition the regime at the external borders of all EU Member States. This chapter will focus instead on the substantive rules of the Schengen *acquis* which determine the border crossing regime at the Schengen external borders. The two most important measures in this respect are the Schengen Borders Code (SBC) and the Regulation on local border traffic (LBT).[1]

The objective of the SBC is "the establishment of rules applicable to the movement of persons across borders."[2] It provides the legal framework for controls at the external borders. These controls consist of border checks and border surveillance. This chapter will focus on the position of the individual at the external borders, concentrating on the rules for border checks.[3] Although the SBC differentiates between people who enjoy the right of free movement on the basis of Community law and those who do not, it is self-evident that the majority of TCNs will fall into the latter category. The majority of TCNs cannot claim border crossing rights and the SBC itself does not provide for any such right. Article 5 of the SBC merely sets out the preconditions for the entry into Schengen territory.

This chapter will first of all examine these conditions for entry. It will proceed to establish the relationship between the Schengen borders regime and the free movement rights under EC law. It will then examine the relationship between the Schengen borders regime and the Community legislation on asylum. These rules, establishing a Community approach towards the obligations incumbent on the Member States under international refugee law, were originally within the scope of the Schengen *acquis*. They have however come to be dealt with separately, first as an "area of common interest" under Article K.1 TEU and currently under Title IV EC. Although some of the non-Schengen Member States have opted into these

[1] Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006, L105/1 (hereinafter: 'SBC') and Regulation (EC) No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States, *OJ* 2006, L405/1 (hereinafter: 'LBT Regulation').
[2] Recital 19, SBC.
[3] See Chapter IV for a discussion of the provisions of the SBC that do not relate directly to the act of crossing a Schengen external border, including surveillance. See in Chapter III for a discussion of the rules on the temporary reintroduction of checks at the internal borders.

rules, they will be discussed here, because of how closely related they are to the Schengen regime. Finally, a closer look will be had at the possible implications for the Schengen borders crossing rules of some of the Commission's proposals contained in its 2007 Communication "Preparing the next steps in border management in the European Union."[4]

2. From Common Manual to Schengen Borders Code

When the Schengen *acquis* was integrated in the EU legal order, its definition proved to be a more difficult job than expected for it consisted not only of the Schengen agreements but also of a host of Decisions by the Schengen Executive Committee.[5] This was also true for the rules on controls at the external borders. The basic rules were found in Articles 3-8 of the Schengen Implementing Convention (CISA). The most important Decision of the Executive Committee complementing these rules was the Common Manual for Border Guards.[6] It was partly declassified and published, but only after its integration into EU law.[7] The Schengen provisions on borders were either assigned to Article 62(2)(a) EC specifically or more broadly to Article 62.[8] Interesting to note is that the Common Manual was assigned not only to Article 62 EC, but also Article 63 EC, the legal basis for measures on irregular migration.

Already before their integration into the EU legal order the status of the Common Manual and the related decisions on the external borders was rather unclear. Arguably, they were neither decisions of an international organisation, nor international agreements. Being incorporated into the EU legal framework as such, doubts as to their legal status persisted since they could not be classified as any of the legal instruments listed in Article 249 EC.

The Vienna Action Plan adopted in 1998 by the Justice and Home Affairs (JHA) Council did not foresee any specific new measures or amendments to the rules on the external

[4] COM(2008) 69 final, Commission Communication, 'Preparing the next steps in border management in the European Union.'
[5] Monar, J., 'Justice and Home Affairs', in: Edwards, G. and Wiessala, G. (Eds), *The European Union 1998: Annual Review of Activities* (JCMS, Oxford, Blackwell, 1999), 165.
[6] Common Manual, *OJ* 2002, C 313/97.
[7] Council Decision 2000/751/EC on declassifying certain parts of the Common Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985, *OJ* 2000, L303/29 and Council Decision 2002/353/EC on declassifying Part II of the Common Manual adopted by the Executive Committee established by the Convention implementing the Schengen Agreement of 14 June 1985, *OJ* 2002, L123/49.
[8] Council Decision 1999/436/EC determining the legal basis for each of the provisions or decisions which constitute the Schengen acquis, *OJ* 1999, L176/17.

borders.[9] In 1999, the Council's Frontiers Working Party did draw up a Schengen regulations Action Plan, which provided for regulations concerning local border traffic and common standards for the surveillance of land and sea borders.[10] The plan's time path foresaw in the development of rules for local border traffic as one of the first measures to be taken in 2000 still, while rules on common standards were foreseen for 2002, both falling within the five year deadline set by Article 61 EC. It should be noted though, that already under Article 3 CISA the Executive Committee had been under an obligation ("shall") to adopt rules on local border traffic.

The legislative output was however limited to a regulation in which the Council reserved the power to update the Common Manual and its annexes to itself, a Decision on the signs to be used at border crossing points and a regulation on the systematic stamping of TCNs' passports upon entry and exit. [11] The Council further adopted a range of non-binding Council conclusions, including a Schengen Catalogue of Recommendations and Best Practices on external border control, removal and readmission.[12]

A first reference to the establishment of a "common corpus of legislation" was made in the Commission communication of 2002 on the Integrated Management of the External Borders of the Member States of the EU.[13] It announced a proposal for a regulation, recasting the Common Manual's provisions and clarifying their legal status, as well as for a Regulation on local border traffic. The SBC was proposed in May 2004 on the basis of Articles 62(1) and (2)(a), and adopted in March 2006. It provides a comprehensive legal framework for the management of the external borders, including the rules for checks at the Schengen external borders.[14]

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[9] Action Plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, JHA Council, 3 December 1998, *OJ* 1999, C19/1.

[10] Council Document 12479/99.

[11] Regulation (EC) No 790/2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance, *OJ* 2001, L116/5; Council Decision 2004/581/EC determining the minimum indications to be used on signs at external border crossing points, *OJ* 2004, L261/119; Council Regulation (EC) No 2133/2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen agreement and the common manual to this end, *OJ* 2004, L369/5.

[12] EU Schengen Catalogue, External border controls, removal and readmission: Recommendations and best practice: http://ue.eu.int/uedocs/cmsUpload/catalogue20EN.pdf. See for an updated version: Council Document 15250/2/08.

[13] COM(2002) 233 final, 12.

[14] It repeals the relevant parts of the CISA, as well as the Common Manual and subsequent amendments made thereto (see Article 39, SBC), but also includes parts of the Schengen *acquis* that were previously contained in other decisions, for instance regarding the re-instatement of checks at the internal borders.

3 Checks at the External Borders

The SBC states that external borders may only be crossed at designated border crossing points and only during fixed opening hours.[15] Cross-border movement at the external borders are subject to checks by border guards. Article 7(2) of the SBC determines that all persons crossing the Schengen external border must undergo a minimum check in order to establish their identity on the basis of the production of their travel documents. These checks may cover the means of transport and objects in the possession of the person crossing the border, but in that case national law applies to any searches carried out.

It was the European Parliament, for the first time involved in the adoption of an act on external borders as co-legislator, that insisted on the inclusion of an obligation on border guards to respect human dignity, to respect the principle of proportionality and not to discriminate on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[16]

3.1 Persons enjoying the Right of Free Movement under Community Law

Article 7(2) of the SBC states that a minimum check is the rule for persons enjoying the Community right of free movement. As we saw in the previous chapter, any formality other than the production of a valid identity card or passport at whatever place or time and in whatever form would contrary to the rules on the free movement of persons.[17] Nevertheless, the minimum check must be considered as more comprehensive than the "Bangemann Wave" which was applied in the 1990s at the UK and Irish borders, in that it establishes identity rather than nationality.

The category of persons enjoying the Community right of free movement is defined in Article 2(5) of the SBC. It is composed of EU citizens, TCNs that can claim free movement

[15] There are 1792 designated EU external border crossing points with controls (665 air borders, 871 sea borders and 246 land borders): Commission, 'New tools for an integrated European Border Management Strategy' (MEMO/88/85, 13 February 2008). Article 4(2), SBC contains a limited number of exceptions for pleasure boats, seamen, requirements of a special nature or cases of unforeseen emergency. The Commission Proposal included an exception for a Member State's own nationals, but this was deleted by the Council: Article 4(2)(d), COM(2004) 391 final.

[16] Article 6, SBC. EP Report on the proposal for a regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (A6-0188/2005), 65. Co-decision was made applicable by Council Decision 2004/927/EC providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, *OJ* 2004, L396/45.

[17] Case 157/79, *Pieck* [1980] ECR 2171, para 10.

rights on the basis of Directive 2004/38/EC and TCNs who are nationals of countries with which the EC and its Member States have concluded agreements on the extension of the free movement of persons, *i.e.* the EFTA countries. Note that this category does not include TCNs with more limited free movement rights on the basis of secondary legislation adopted under Title IV EC.

Article 7(2) of the SBC states that border guards may consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to public health.[18] The proviso that this may only be done on a non-systematic basis seems to ensure conformity with the Court's ruling in *Commission v Belgium*.[19] Practice seems to indicate that there is a systematic computer checking of passports, in particular at airports, even if the purpose of these checks is rather to verify the authenticity of the documents.

The result of a consultation of databases shall not jeopardise the right of entry of persons enjoying the Community right of free movement into the territory of the Member State concerned as laid down in Directive 2004/38/EC.[20] This would have to mean that where a person who enjoys the Community right of free movement is considered a threat to the international relations of the Member States, s/he cannot be refused entry on this ground, since this ground for refusal is not included in the list of derogations in Directive 2004/38.[21] However, it could probably be brought under the category of public policy, bearing in mind however that this concern has to be assessed in relation to the Member State invoking it.[22]

3.2 Third Country Nationals

Article 5 of the SBC lists the conditions of entry for TCNs for stays not exceeding three months. For the purpose of the SBC, a TCN is defined as any person who is not an EU citizen *and* who does not have a right of free movement under Community law.[23]

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[18] Note how the reference to "European databases" is vague, allowing for the development of new databases in the future, see Chapter VIII.
[19] Case 321/87, *Commission v Belgium* [1989] ECR 997, para. 15.
[20] Article 7(2), SBC. A more correct formulation would have been the rights of persons enjoying the Community right of free movement, since Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* 2004, L158/77 does not apply to Switzerland.
[21] Chapter VI, Directive 2004/38/EC, *ibid.*
[22] Case C-33/07, *Jipa* [2008] ECR I-0000, *nyr*, para. 25, see Chapter IV.
[23] Article 2(5) read in conjunction with Article 5(6), SBC.

Valid Travel Document and Visa

A TCN must first of all be in possession of a valid travel document. Article 10 of the SBC provides that the travel documents of TCNs shall be systematically stamped on entry and exit. This applies also to TCN family members of an EU citizen who do not present their residence card.[24] Article 11 determines that the absence of an entry stamp in the travel document of the TCN leads to the (rebuttable) presumption that the holder does not fulfil, or no longer fulfils, the conditions relating to the duration of stay.[25]

If the TCN is a national of a country included in Annex I of Regulation (EC) No 539/2001 s/he will further require a visa.[26] The Common Consular Instructions (CCI) contain the conditions governing the issue of visas by the Member States' consulates.[27] Despite the existence of the CCI, there is considerable difference in the way in which consulates handle requests for visas.[28] Point V of the CCI gives a list of very broad criteria to be taken into consideration when examining a visa application: the security of the Contracting Parties, the fight against illegal immigration as well as other aspects relating to international relations. In fact the Schengen visa system is one of mutual recognition of national visas.[29] It should be recalled that "[m]ere possession of a uniform visa does not entitle automatic right of entry.[30]

The CCI contains rules as to the Member State responsible for deciding on a visa application.[31] This is either the Member States of main destination or, in the absence of a main destination, the Member State of first entry. However, once a visa is issued, the SBC does not seem to impose any restrictions as to where the Schengen external borders may be crossed. The proposal to recast the CCI in a regulation establishing a Community Visa Code

[24] Article 10(2), SBC. Article 10(3) of the SBC contains further specific exceptions including Heads of States, pilots, seamen and the inhabitants of Andorra, Monaco and San Marino.
[25] Article 11, SBC.
[26] Article 1(1), Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, *OJ* 2001, L81/1.
[27] Common Consular Instructions on Visas for Diplomatic Mission and Consular Posts, *OJ* 2002, C313/1 (hereinafter: 'CCI').
[28] Guiraudon, V., 'Garanties financières exigées pour les demandeurs indiens de visas de court séjour (visite ou tourisme) : quelques exemples européens', *Cultures & Conflits* 50 (2003), 49-52; Jileva, E., 'La mise en oeuvre de Schengen : la délivrance des visas en Bulgarie', *Cultures & Conflits* 50 (2003), 31-48. See also 'Visa Policies of European Union Member States - Monitoring Report' (Warsaw, Stefan Batory Foundation, June 2006).
[29] Guild, E. and Bigo, D., 'La politique commune des visas : les luttes pour l'homogénéisation ou le maintien d'un réseau hétérogène ?', *Culture & Conflits* 49 (2002), 71-81.
[30] I.2.1, CCI.
[31] Part II, Article 1, CCI.

would mean an important improvement.[32] Article 23(1) of the draft Regulation contains a number of precise criteria for refusing a visa. The grounds for refusing a visa under the proposal largely overlap with the grounds for refusal of entry under the SBC. Article 23 would furthermore introduce a duty to provide the reasons for refusal in written and the right to an appeal against such refusal in accordance with national law. Recently, JLS Commissioner Barrot has suggested that the national Schengen visa be replaced with a Community Schengen visa, possibly to be issued by a Common Community Consular Authority.[33]

Article 11 CISA distinguishes between a travel visa and a transit visa. A travel visa is valid for one or more entries, provided that neither the length of a continuous visit nor the total length of successive visits exceeds three months in any half-year from the date of first entry. A transit visa authorises the holder to pass through the territories of the Contracting Parties once, twice or exceptionally several times from one third country to another, provided that transit does not exceed five days. Visas used for a period of more than three months are national visas, but shall nevertheless, for a period of not more than three months from their initial date of validity, be valid as uniform short-stay visas if they were issued in conformity with the Schengen rules for the issuing of short term visas. If not, the long term visa shall be valid as a visa allowing for transit to the Member State that issued it.[34]

Article 13 CISA determines that the period of validity of a travel document must exceed that of the visa, taking account of the period of use of the visa.[35] A uniform application of the Schengen rules may be compromised where not all Member States recognize the validity of travel documents from a certain third country. Article 14(1) of the CISA provides that in such cases the visa affixed to the travel document is only valid for the Contracting Parties that recognize the validity of the travel document.

A visa with limited territorial validity is affixed in exceptional cases to a passport, travel document or other document which entitles the holder to cross the border, where the

[32] COM(2006) 403 final, Proposal for a Regulation establishing a Community Code on Visas.
[33] 'Bruxelles veut mettre en place un visa européen unique' (*Le Monde*, 10 June 2009).
[34] Article 2, Council Regulation (EC) No 1091/2001 on freedom of movement with a long-stay visa, *OJ* 2001, L150/4.
[35] The decision whether to subject the nationals of a particular third country to a visa duty is made on the basis of a set of criteria which are grouped under three headings: illegal immigration, public policy and international relations, see COM(2000) 27 final, 9.

visit is authorized only in the national territory of one or more contracting Parties, provided that both entry and exit are through the territory of these Contracting Parties.[36]

The repealed Common Manual stated in point 3.2.2 that "a visa with limited territorial validity is a national visa whose validity is limited to the territory of the State(s) which issued it. This visa does not enable its holder to invoke Article 19 of the Convention [on free movement within territory of the Contracting Parties] for the purposes of staying in the territory of the other Contracting Parties." The SBC does not seem to provide for a right of transit in the case where a TCN presents his/herself at the external border of Member State X with a visa with limited territorial validity for Member State Y.

In accordance with Article 5(4)(b) of the SBC, the TCN who fulfils all conditions for entry, except the visa requirement may be authorised a visa at the border in accordance with Council Regulation (EC) No 415/2003 on the issue of visas at the border, if s/he can show proof that it was impossible to apply for a visa in advance, that there are "unforeseeable and imperative reasons for entry" and return to the third country will be guaranteed.[37]

Two Council Decisions introduced a simplified regime for the control of persons at the external borders by qualifying certain documents as equivalent to national visas and unilaterally recognising certain residence permits issued by Switzerland and Liechtenstein for the purpose of transit through their territory.[38] The recitals to these decisions justified the measures from a need to decrease the administrative burden on the consulates of the Member States and the lack of a risk of immigration from the category of travelers concerned. One of the documents that could be considered as equivalent to a national visa by the Member States that acceded to the EU in 2004 and did not yet fully apply the Schengen *acquis* is the residence permit issued by another Member State. In the case of a TCN family member of an EU citizen this seems to be a duty rather than a possibility having regard to Article 5(2) of Directive 2004/38/EC.[39]

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[36] Part I, Article 2.3, CCI.

[37] Article 1(1), Council Regulation (EC) No 415/2003 on the issue of visas at the border, including the issue of such visas to seamen in transit, *OJ* 2003, L64/1.

[38] Decision No 895/2006/EC introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by [EU-10 Member States] of certain documents as equivalent to their national visas for the purposes of transit through their territories, *OJ* 2006, L67/1 and Decision No. 896/2006/EC establishing a simplified regime for the control of persons at the external borders based on the unilateral recognition by the Member States of certain residence permits issued by Switzerland and Liechtenstein for the purpose of transit through their territory, *OJ* 2006, L167/8.

[39] Directive 2004/38/EC, *supra* note 20.

A separate visa list exists for a small group of TCNs who pass through an international airport located in an EU Member State and are required to be in possession of an Air Transit Visa (ATV) on the basis of Joint Action 96/197/JHA and Annex III to the Common Consular Instructions (CCI).[40] Recital 4 of the Joint Action clearly identifies the risk of illegal immigration by nationals from these countries as the main motivation for their inclusion on the list. The ECJ has held that in the case of transit, a TCN does not pass the legal external border.[41] Although it would be logical to conclude from this judgment that the SBC does not apply to the category of passengers that remain in a transit area on airports, the SBC does contain in Annex VI, point 2.1.3 rules for this category of TCNs. Checks are normally not carried out on the aircraft, at the gate or in transit areas, unless this is justified on the basis of an assessment of the risks related to internal security and illegal immigration. Within the transit area checks may be carried out to see whether persons subject to the duty to have an airport transit visa are in possession of one.

Article 5(1)(b) of the SBC exempts the TCN holders of a valid residence permit from having a visa. A valid residence permit is defined in Article 15(a) as a residence permit issued by the Member States according to the uniform format laid down by Regulation (EC) No 1030/2002 and all other documents issued by a Member State to third country nationals authorising a stay in, or re-entry to, its territory, with the exception of temporary permits issued pending examination of a first application for a residence permit under Regulation (EC) No 1030/2002 or applications for asylum.[42]

Regulation (EC) No 539/2001 was amended so as to exempt recognised refugees, stateless persons and other persons who do not hold the nationality of any country who reside in a Member State and are holders of a travel document issued by that Member State.[43] The amendment was deemed necessary to broaden the exemption contained in Article 5(1)(b) of the SBC to those categories of people living in a Member State to which the Schengen *acquis* did not yet apply in full.[44] The broadening of the exemption has primarily benefited the "non-citizen" population of Latvia and Estonia, holding a so-called "grey-passport", before the full

[40] Joint Action 96/197/JHA on airport transit arrangements, *OJ* 1996, L63/8. Annex III, CII, which applies between the Schengen Member States, lists the same countries as Joint Action 96/197/JHA, namely Afghanistan, Congo (Democratic Republic), Eritrea, Ethiopia, Ghana, Iraq, Iran, Sri Lanka, Nigeria and Somalia, with the exception of Bangladesh and Pakistan which have since been added.
[41] Case C-170/96, *Commission v. Council* ("Air Transit Visas") [1998] ECR I-3655, para. 23.
[42] Council Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals *OJ* 2002, L157/1.
[43] Council Regulation (EC) No 1932/2006, amending Regulation (EC) No 539/2001,*OJ* 2006, L405/23.
[44] Recital 6, *ibid*.

application of the Schengen *acquis* in those Member States. The fact that this amendment was deemed necessary is significant, as it seems to confirm that the term Member State in the SBC needs to be interpreted throughout the text as applying only to those Member States that fully apply the Regulation. One could argue that a TCN holding a residence permit from either the UK or Ireland and who is under an obligation to hold a visa in order to cross the Schengen external borders could still be exempted from the visa requirement by holding a residence permit from the UK or Ireland since both countries have opted into Regulation (EC) No 1030/2002. It may however be questioned if the same holds true for other documents issued by these Member States authorising stay or (re-)entry into their territory.

A specific transit regime is in force for residents of Kaliningrad, the Russian enclave enclosed by EU Member States. Council Regulation (EC) No 693/2003 provides for a Facilitated Transit Document (FTD) and a Facilitated Rail Transit Document (FRTD).[45] They have the same value as transit visas and are territorially valid for the issuing Member State and other Member States through which the facilitated transit takes place.[46]

Resident of the Moroccan provinces of Tetuan and Nador have always been subject to "specific arrangements for visa exemptions for local border traffic" with the Spanish enclaves of Ceuta and Melilla. These exemptions have remained in force under the declaration made by Spain at the time of its accession to the Schengen Agreements.[47]

Other conditions for entry

Although a valid visa may well be considered the most important condition for entry, it is certainly not the only one. Article 5 of the SBC further requires that the TCN 1) justifies the purpose and conditions of his/her intended stay, 2) disposes of sufficient means of subsistence, 3) has not been alerted in Schengen Information System (SIS) for the purposes of refusing entry, 4) is not considered a threat to public policy, internal security, public health or the international relations of any of the Member States.

[45] Council Regulation (EC) No 693/2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual, *OJ* 2003, L99/8 and Council Regulation (EC) No 694/2003 on uniform formats for Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD) provided for in Regulation (EC) No 693/2003, *OJ* 2003, L99/15.
[46] Article 3(1), Regulation (EC) No 693/2003, *ibid.*
[47] Final Act, Part III, Article 1(b), Spanish Act of Accession to the Schengen Agreements (*OJ* 2000, L 239/73).

The current functioning of the SIS, which since the inclusion of new Member States in the system is referred to as SIS1+, is still governed by the CISA. Article 96 CISA lays down the criteria for making an entry in the SIS. Entries must be "resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law." They can be based on the "threat to public policy or public security or to national security" that a person's presence within the Schengen territory may pose, or on the basis of a decision under the immigration laws of a Contracting Party regarding the deportation, refusal of entry or removal of this person. The term threat to public policy is not defined. Neither is threat to public security, internal security or the international relations of any of the Member States in the SBC. In the SBC only the threat to public health has been defined, in the same way as it has in Directive 2004/38/EC. One may however assume that a Member State's discretion in determining a threat to public health, public policy or public security in relation to TCNs is broader than under Directive 2004/38/EC.[48] Under Directive 2004/38/EC public policy is an exception to a fundamental Treaty freedom of free movement, whereas there is no right to cross the Schengen external borders.

Regulation (EC) No 1987/2006 governs the new SIS (SIS II) in respect of matters falling within the First Pillar.[49] The Regulation has not significantly changed the rules for making an entry.[50] It does add the proviso that national decisions to issue an alert should be taken "on the basis of an individual assessment."[51] This should be read together with the proportionality requirement of Article 21 which reinforces the obligation already present in Article 94(1) CISA, that a case should be "important enough to warrant the entry of the alert in the SIS" by requiring that an entry is "adequate" and "relevant."[52] Article 26 adds a ground for making an entry in relation to TCNs who are subject to restrictive measures preventing entry or transit in accordance with Article 15 EU, including measures implementing travel bans issued by the UN Security Council.

It should be regretted that there are still no precise criteria for listing persons to be denied entry. As the House of Lords EU Committee noted, in some Member States, anyone

[48] We would argue that an exception would have to be made for TCN who have (limited) free movement rights on the basis of secondary legislation adopted under Title IV EC, see Chapter V and below.
[49] Regulation (EC) No 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), *OJ* 2006, L381/4. Council Decision 2007/533/JHA (*OJ* 2007, L205/63) does so in respect of Third Pillar legislation,.
[50] Article 24(2) and (3), Regulation 1987/2006.
[51] Article 24(1), Regulation
[52] See in more detail: Brouwers, E., 'The Other Side of Moon - The Schengen Information System and Human Rights: A Task for National Courts (Brussels, CEPS Working Document No. 288, April 2008).

issued with an expulsion decision, as well as failed asylum-seekers, are automatically made the subject of an "alert" to stop them from entering any other Member State.[53]

Article 11 of the "Returns Directive" requires that return decisions are accompanied by an entry ban if no period for voluntary departure has been granted, or if the obligation to return has not been complied with. In all other cases a return decision may, but need not, be accompanied by an entry ban.[54] The minutes of the Council at the moment of the adoption of the Directive state the Commission's declaration that the review of the SIS II, as envisaged by Article 24(5) of Regulation (EC) No 1987/2006) would be the opportunity to propose an obligation to register entry bans issued under this Directive in the SIS.[55]

A TCN who does not fulfil all conditions from Article 5(1) of the SBC may still be authorised to enter if s/he holds a residence permit or re-entry visa from one of the Member States (or where required both) on the basis of Article 5(4)(a). Entry is for the purpose of transit, allowing them to reach the Member State in question. Entry can still be denied if the TCN is on a national list of alerts of the Member State whose external borders (s)he attempts to cross and the alert is accompanied by instructions to refuse entry or transit.

Border checks

Article 7(3) of the SBC states that TCNs shall be subject to thorough checks upon both entry *and* exit. Specific rules for the various types of border and means of transport used for crossing the external borders are set out in Annex VI. Entry controls comprise the verification of the conditions for entry set out above, and where applicable, of documents authorising residence and the pursuit of professional activity. Under Article 8, a relaxation of checks on entry and exit is possible. These must be temporary and priority must be given to entry checks.

[53] Report of the House of Lords Select Committee on the EU, 'Schengen Information System II (SIS II)' (HL Paper 49, Session 2006-07, 9th Report, 2 March 2007), 23-24.
[54] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country, *OJ* 2008, L348/98 (hereinafter: 'Returns Directive').
[55] Council Document 16166/08 ADD 1 REV 1.

The adoption of the Regulation on the Visa Information System (VIS), necessitated an amendment to the SBC in relation to the verification of the visa requirement.[56] The VIS should facilitate checks at the external border crossing by allowing border guards access to data included in the system by Member States' visa authorities.[57] In accordance with Article 18 of the VIS Regulation, border guards have access to search the VIS for the purpose of verification of the identity of the holder of the visa and of the authenticity of the visa, by consulting the system using the number of the visa sticker or the fingerprints of the visa holder in order to verify the identity of the visa holder, the authenticity of the visa and whether the conditions for entry to the territory of the Member States in accordance with Article 5 of the SBC are fulfilled. This formulation is rather odd. Of course possession of a visa, where required, is an entry condition, yet the reference to all entry conditions listed in Article 5 seems much broader and would allow the VIS to become a data base with a broader purpose than verifying the validity of the visa.

Regulation (EC) No 81/2009 amending the SBC adds in Article 7(3) that thorough checks on entry shall include a check of the VIS.[58] It limits however the purpose of such checks to verifying the identity of the visa holder and authenticity of the visa.[59] On the initiative of the Parliament the obligation to systematically check the VIS may be limited at specific border crossing points to a check of the visa number alone, checking it at random in combination with the finger print.[60] This may be done when waiting times are excessive, resources have been exhausted and there is no risk for internal security and irregular immigration.[61] Although the concern of the Parliament that a systematic check of the VIS could lead to long queues at the border is justified, the latter condition is ill-defined and leaves too much room for diverging interpretations.

Under Article 18(4) of the VIS Regulation, a match on the basis of the fingerprints or visa-sticker will allow the border guard access to a broader range of information taken from the application form, as well as photographs and data entered in relation to visa(s) issued, annulled, revoked or whose validity is extended or shortened. In case the verification of the

[56] Regulation (EC) No 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, *OJ* 2008, L218/60 (hereinafter: 'VIS Regulation'); COM(2008) 101 final.
[57] Article 2(d), VIS Regulation.
[58] Article 1, Regulation (EC) No 81/2009 amending Regulation (EC) No 562/2006 as regards the use of the Visa Information System (VIS) under the Schengen Borders Code, OJ 2009, L35/56.
[59] Article 7(3)(aa), SBC.
[60] EP Report on the proposal for a regulation amending Regulation (EC) No 562/2006 as regards the use of the Visa Information System (VIS) under the Schengen Borders Code (A6-0208/2008).
[61] Article 7(3)(ab), SBC.

visa holder or visa is unsuccessful, or when there are doubts as to the identity of the visa holder, the authenticity of the visa or travel document, Article 18(5) determines that "duly authorised staff of those competent authorities" may access the VIS in accordance with Article 20(1) and (2) of the VIS Regulation.

Article 20 holds that for the sole purpose of identification of a person who may not fulfil the conditions for entry, stay or residence, the authorities responsible for checks at the external borders and within the Member States' territory may search the VIS in order to check whether indeed this person does not fulfil these conditions. If the person is listed in the VIS, the competent authority is given access to information taken from the application form, as well as photographs and data entered in relation to visa(s) issued, annulled, revoked or whose validity is extended or shortened.

Exit controls comprise the verification of the validity of the travel documents and wherever possible whether the TCN is considered a threat to public policy, internal security or the international relations of any of the Member States. Exit checks *may* further include a check to see whether the TCN is in possession of a visa where this would be required by Regulation (EC) No 539/2001 and whether s/he overstayed this visa. Regulation (EC) No 81/2009 amending the SBC, has added to Article 7(3)(c)(i) that this verification *may* include a consultation of the VIS in accordance with Article 18 upon exit.[62]

A new Article 7(3)(d) of the SBC gives border guards the general competence to consult the VIS "for the purpose of identification of any person who may not fulfil, or who may no longer fulfil, the conditions for entry, stay or residence on the territory of the Member States" in accordance with Article 20 of the VIS Regulation.[63] Oddly enough this possibility is not explicitly included for checks upon entry, but reading Article 18 in combination with Article 20, can only lead one to conclude that also upon entry border guards may consult the VIS on the basis of Article 20 for the purpose of identification of someone they believe does not fulfil the conditions for entry, stay or residence.

Under the CCI, visa overstay means that a visa applicant can be considered a risk from an immigration point of view. Presumably however, the fact that a TCN has overstayed his/her visa would follow only from the exit stamp in the passport, which upon requesting a

[62] Article 2, Regulation (EC) No 81/2009, supra note 58.
[63] Article 3, *ibid*.

new visa could be circumvented by presenting a new identity document.[64] It is unclear what action would have to be taken when a TCN is found to have overstayed his/her visa.[65] Border guards are not amongst the authorities that have the possibility to enter data in the VIS.[66] Under Article 6(1) of the Returns Directive Member States must issue a return decision to any TCN staying illegally on their territory. If departure is however imminent this seems superfluous.[67] It seems that in this case Member States may refrain from issuing a return decision on the basis of the exception contained in Article 6(4) of the Directive which allows them to grant an authorisation to stay at any time.[68] As Peers notes, if at any point the entry-exit system is to be linked to the issuing of a return decision under the Returns Directive, or an entry ban under Article 11 of that Directive and the SIS/SIS II, this would require the Community legislator to lay down a uniform definition of overstay and define the situations in which overstay is excusable.[69]

Exit control may also comprise a consultation of alerts on persons and objects included in the SIS and reports in national data files. Annex II to the SBC includes registration of "persons apprehended and complaints (criminal offences and administrative breaches)" amongst the information that is to be recorded at border crossing points.

Upon request of the TCN and where facilities exist, thorough checks are carried out in a private area. In the case of so-called second line checks, i.e. checks carried out away from the location at which persons are generally checked, the TCN will be informed of the purpose and procedure of such check. The information must be available in the official Union languages and the languages of the bordering countries and should indicate that the TCN has the right to request the name or service identification number of the border guards carrying out the second line check, the name of the border crossing point and the date on which the border was crossed.

Article 13(1) of the SBC states that a TCN not fulfilling the requirements set out in Article 5 will be refused entry. However, it should be stressed that even when all conditions in

[64] This is one of the reasons for which the Commission is contemplating the introduction of an entry-exit system: COM(2008) 69 final, *supra* note 4, 5.
[65] Not to mention practical difficulties border guards may have in establishing overstay, where for instance different travel documents are used or entry stamps are illegible: *ibid.*, 5.
[66] Article 6(1), VIS Regulation.
[67] In fact only one Member State seems to consider overstay alone a reason for issuing a deportation order (Council Document 13403/08).
[68] Note that under Article 2(2)(a) of Directive 2008/115/EC, *supra* note 54, Member States may decide not to apply the Directive to a refusal of entry.
[69] Peers, S., 'Proposed New EU Border Control Systems' (EP Briefing Paper, June 2008, PE 408.296), 8.

Article 5 are fulfilled, the SBC does not provide for a right of entry. This has been rightly criticized by Peers, who argues that far from creating a "human right to enter", this would simply ensure legal certainty and respect for the rule of law in this area of EC competence.[70]

Article 13(2) of the SBC states that entry may only be refused by a substantiated decision of an authority empowered by national law, stating the precise reasons for refusal. In the context of joint operational activity of Member States' border guards authorities this may only be a border guard of the Member State whose border the TCN attempted to cross.[71] In accordance with Annex II of the SBC border crossing points must record refusals of entry.

Persons refused entry have a right to appeal under the law of the Member State in question. This appeal does not have a suspensive effect.[72] One could wonder to what extent these procedural rights apply where persons are apprehended attempting to cross the external border outside the designated border crossing points. Considering the wording of Article 13(2) ("may *only* be refused") and the importance of a substantiated decision in writing for the accountability and transparency of border guards' work a broad interpretation of this Article is justified. The fact alone that a TCN attempted to cross the external border outside the designated border crossing points cannot suffice, in particular in view of the possible exception contained in Article 4(2) and the obligation to verify any claims for asylum.

4. The Local Border Traffic Regime

On 20 December 2006 the Community legislator adopted Regulation No 1931/2006 laying down rules on local border traffic at the external land borders.[73] The LBT Regulation derogates from the SBC for the benefit of border residents, aiming to prevent the imposition of the Schengen border controls from disrupting local border economies. TCN border residents may be issued a LBT permit, which allows them to cross the border under the LBT

[70] Peers, S., *Justice & Home Affairs Law* (Oxford, OUP, 2006), 150.
[71] Article 10(10), Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L349/1 ("Frontex Regulation").
[72] Article 13(3), SBC.
[73] The legislative history of this Regulation shows quite nicely the effects of the transitional period to which Title IV EC was subject. An initial proposal, COM(2003) 502 final, was based on Articles 62(2)(a) (external borders) and Articles 62(2)(b)(ii) and (iv) (visas). As of 1 May 2004 however measures based on Article 62(2)(b)(ii) and (iv) fell under the co-decision procedure in accordance with Article 67(4) EC, while measures based on Article 62(2)(a) were still to be adopted unanimously by the Council. For this reason the Commission drafted two new proposals, which however were merged into COM(2005) 56 final after the Council adopted Decision 2004/927/EC, *supra* note 16.

regime established under this Regulation.[74] Importantly, border residents are allowed an uninterrupted stay of a maximum of three months in the border area. Regulation (EC) No 539/2001 exempts TCNs who hold a LBT card from a visa duty.[75] Compared to the Commission's proposal the approach that was adopted in the final version of the Regulation has the advantage of establishing a more generalised LBT regime, facilitating the actual border crossing, rather than merely mitigating the visa requirement by providing a special multi-entry visa for border residents.[76]

A border resident is defined as a TCN who has been lawfully resident in the border area of a third country neighbouring a Member State for a period of at least a year.[77] The border area comprises an area not extending more than 30 kilometres from the border, including local administrative districts, parts of which extend between 30 and 50 km from the border line.[78]

The conditions for issuing a LBT permit are that the border resident is in possession of a valid travel document, produces proof of his/her status as border resident, provides proof of legitimate reasons to frequently cross the external land border and does not have an alert issued in the SIS for the purpose of refusing entry. Moreover, s/he may not be considered a threat to public policy, internal security, public health or the international relations of any of the Member States or be signalled for these reasons in Member States' national databases for the purpose of refusing entry.[79] Unlike the proposal, Article 12 of the Regulation allows Member States to determine administrative authorities allowed to issue the permit in addition to consulates, thus no longer excluding the possibility of issuing the permit at the external border. The Regulation does not affect the specific arrangements applied in Ceuta and Melilla, leaving in place existing visa exemptions without introducing the more advantageous local border traffic regime.[80]

The entry conditions for the holders of the LBT permit are essentially the same as for the issuing of the permit itself, although Member States may do away with the requirement of having a valid travel document and the permit holder does not have to prove legitimate

[74] Regulation (EC) No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, *OJ* 2006, L405/1 (hereinafter: 'LBT Regulation').
[75] Article 1(2), Regulation (EC) No 539/2001, *supra* note 26.
[76] Article 8, COM(2005) 56 final.
[77] Article 3(6), *ibid*.
[78] Article 3(2), *ibid*. The original proposal only included local administrative districts, parts of which extended a maximum of 35 km from the border line, Article 3(b), COM(2005) 56 final.
[79] Article 9, LBT Regulation.
[80] Article 16, *ibid*.

reasons to frequently cross the external land border.[81] The permit allows local border residents a maximum uninterrupted stay of three months.[82] Member States are held to carry out entry and exit checks on border residents, in order to ensure that they fulfil the entry conditions.[83] No entry or exit stamps are affixed to the LBT permit.[84]

For the implementation of the LBT Regulation, individual Member States are authorised to conclude bilateral Agreements with their neighbouring third countries, subject to the provisions of the Regulation.[85] Such agreements must be reciprocal.[86] Under Article 15 they may provide for an easing of border checks for holders of a LBT permit. The easing may consist of the establishment of specific border crossing points for local border residents only or special lanes at ordinary crossing points. At such points, persons who regularly cross the external land border and who are, by reason of their frequent crossing of the border, well known to the border guards should be subject to random checks only and occasionally to unannounced thorough checks.[87] Under exceptional circumstances border residents may be authorised to cross the external borders at defined places other than authorised border crossing points and outside opening hours.

The fact that the LBT Regulation gives only a general legislative framework within which the Member States *may* negotiate agreements with their neighbouring countries can be explained from the division of competences between the EC and its Member States.[88] A rights-based approach would however have left less discretion to the Member States, providing border residents with a more harmonised set of rights. It is to be hoped that the Commission will take seriously its obligation to make public "by all appropriate means" the content of the bilateral agreements, so that border residents will be aware of their rights.[89] It is unclear to which authority a border resident can appeal in case of a refusal to grant a LBT permit. Presumably this is left to national law. Where entry in accordance with the LBT regime is refused, the provisions of the SBC on refusal of entry should apply, although this is not explicitly stated.

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[81] Article 4, *ibid*.
[82] Article 5, *ibid*.
[83] Article 6(1), *ibid*.
[84] Article 6(2), *ibid*.
[85] Article 13, *ibid*.
[86] Article 14, *ibid*, speaks of "comparability of treatment."
[87] Thorough check should be understood as consisting of a verification that all entry conditions are fulfilled under Article 6(1) of the LBT Regulation, not in the sense of the Article 7(3), SBC.
[88] See in more detail Chapter X.
[89] Article 19, LBT Regulation.

5. The Relationship between the Schengen Rules and the EC Free Movement

The SBC is very clear on the precedence of the EC right of free movement. In Article 3(a) it explicitly states that it is without prejudice to the rights of persons enjoying free movement under Community law. As we noted above the consultation of national and European databases is without prejudice to these free movement rights. Article 7(6) clearly states that checks on a person enjoying the Community right on free movement shall be carried out in accordance with Directive 2004/38/EC.[90] This seems to be an indication that for an EU citizen there should be no difference in crossing either an internal or external border. Nevertheless, as we noted above the minimum check foreseen by the SBC seems to be more extensive then would be allowed at the internal border.

Also the CISA stated clearly in Article 134 that it would apply only in so far as it is compatible with Community law. After the integration of the CISA into EC law, the ECJ in Case C-503/03 was asked to clarify the relationship between the two regimes.[91] The case concerned two Algerian nationals, both married to Spanish nationals (and thus EU citizens) living in a non-Schengen EU Member State. Mr. Bouchoir, living with his Spanish spouse in the UK, was refused a Schengen visa to Spain. Mr. Farid, living with his Spanish spouse in Ireland, was refused entry to Spain upon arrival from Algeria. Both refusals were based on an alert in the SIS. Such an alert is reason for refusal of entry into the Schengen area under Article 5 CISA, currently Article 13(1) of the SBC. However, as was discussed in the previous chapter, the EC provisions on free movement of persons give the TCN spouse of an EU citizen a derivative right of entry and residence.

Within making explicit reference to Article 135 CISA, the Court understandably reaffirmed the fundamental status of the freedom of movement in EC law, holding that a Contracting State may issue an alert for a national of a third country who is the spouse of a Member State national only after establishing that the presence of that person constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society within the meaning of Directive 64/221/EEC.[92]

In such a situation an entry in the SIS is a ground for refusal of entry into the Schengen area. However, the entry must be corroborated by information enabling the Member State consulting the SIS to determine whether indeed the presence of the person concerned

[90] Directive 2004/38/EC, *supra* note 20.
[91] Case C-503/03, *Commission v Spain* [2006] ECR I-01097.
[92] Case C-503/03, *ibid.*, para. 52.

constitutes such threat.[93] In the case at hand the necessary information was not provided. Under the Regulation governing the operation of SIS II, it is explicitly provided that an alert on a third-country national in possession of free movement rights shall be in conformity with the rules adopted in the implementation of Directive 2004/38/EC.[94]

A similar question as the one at hand in *Commission v Spain* could arise regarding the relationship between the Schengen *acquis* and the secondary legislation granting (limited) free movement rights to specific categories of TCNs. Let us imagine the situation of a LTR who wishes to exercise his/her right to reside in another Member State and for that purpose needs to cross a Schengen external border. The possession of a residence card would exempt him/her from a visa requirement. S/he could however be stopped on the basis of a hit in the SIS upon a non-systematic consultation thereof. Drawing a parallel to the Court's ruling, such refusal would only be possible if it fulfills the criteria of the exceptions foreseen in Articles 17 and 18 of Directive 2003/109/EC.[95]

Unfortunately, the SBC does not explicitly include the TCNs covered by this legislation as persons enjoying the Community right of free movement. However, as was argued already in the previous chapter, they do - albeit to a more limited extent - possess such rights. They should therefore be treated accordingly and the case law of the ECJ in the area of free movement should apply *mutatis mutandis*.

6. The Relationship between the Schengen Rules and Rules on Asylum

As we saw in Chapter II, the 1951 Geneva Convention does not provide for a right to asylum, nor does any other international instrument. Nonetheless, there is the obligation of *non-refoulment*, which applies also at the border. Rules on the responsibility for asylum claims initially formed part of the CISA. These provisions have been superseded by the 1990 Dublin Convention, an agreement based on Article K.3 TEU, which after the Amsterdam Treaty was incorporated into EU law as Council Regulation (EC) No 343/2003 ("Dublin II Regulation")

[93] *Ibid*., para. 53.
[94] Article 26, Regulation (EC) No 2006/1987, *supra* note 49.
[95] Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, *OJ* 2003, L16/44.

based on Article 63(1)(a) of Title IV EC.[96] The Dublin II Regulation stipulates that a Member State shall examine the application for asylum made *at the border* or in their territory.[97] It is important to note that this Regulation also applies to the UK and Ireland, Denmark as well as the Schengen Associated Countries (SAC). [98]

The CISA stated in Article 135 that its provisions are subject to the 1951 Geneva Convention.[99] Article 3(b) of the SBC stipulates that the Regulation will apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*. Article 4(3) of the SBC provides that the obligation for Member States to introduce penalties for unauthorised border crossing is without prejudice to the Member States' international protection obligations. Article 13, on the refusal of entry of a TCN not fulfilling the conditions for entry, states that the article shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas. Accordingly, Article 5(4)(c) states that a Member State may admit a TCN not fulfilling all entry conditions on the basis of humanitarian consideration and international obligations. It may therefore be concluded that the Schengen rules as such do not affect an asylum seeker's right to request asylum in one of the Member States.

The real problem for asylum seekers and persons in need of international protection is indeed of a different nature. The broader instruments of immigration control, namely visa obligations and carrier sanctions, are essentially means to prevent asylum seekers from actually arriving at the territory of the Member States, thereby preventing the responsibility of the Member States from arising.[100] An example is the Airport Transit Visa (ATV).[101] From the ten ATV

[96] Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003, L50/1 ("Dublin II Regulation").
[97] Article 3(1), *ibid*.
[98] The UK and Ireland have opted in to the Regulation. Under its opt-out Denmark could not participate, but remained bound by the Dublin Convention instead (recitals 18-19, *ibid*.). It has now associated itself through a separate agreement (*OJ* 2006, L66/38). Norway and Iceland associated themselves with the Dublin rules in 2001 (OJ 2001, L93/40), Switzerland did in 2008 (*OJ* 2008, L53/5). Norway, Iceland and Switzerland are bound vis-à-vis each other in relation to the Dublin rules by a separate agreement between these countries.
[99] Peers states that this provision has not been integrated into EU law: Peers, S., 'Revising EU Border Control Rules: A Missed Opportunity?' (Statewatch Analysis, 2005), 3. However, the integral Schengen *acquis*, including the CISA Convention, has been integrated into EU law by the Schengen Protocol. The Council merely deemed it unnecessary to assign a legal basis to this Article: Article 2(a) read in conjunction with Annex B, Council Decision 1999/435/EC concerning the definition of the Schengen acquis, *OJ* 1999, L176/1. In any case Community law will always be subject to the international obligations and human rights requirements, even where this is not made explicit.
[100] See in detail: Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control* (PhD thesis, Aarhus University, 2009).

countries, in 2008 five were in the top ten of countries of origin of asylum applicants in the EU.[102] In addition, border controls are increasingly "extra-territorialised", meaning that they take place outside Schengen territory, for instance on the high seas or in third country territorial waters in agreement with the coastal state.[103]

For a TCN who is required to be in possession of a visa, the *de facto* border of the Schengen Area may actually lie beyond the territorial Schengen border.[104] This can first of all be the consulate of the Schengen Member State in the country in which s/he applies for a Schengen visa. Secondly, it can be the check-in desk of airports, train stations or seaports. Article 26 CISA requires the Schengen States to impose penalties on carriers who transport aliens who do not posses the necessary travel documents. The result is that persons whose travel documents are not in order will not be allowed to board and will not even arrive at the actual Schengen border. In May 2001 a directive was adopted in order to harmonise the sanctions against carriers.[105]

While the Directive on carrier sanctions states that the provisions on penalties for carriers are without prejudice to Member States obligations where someone asks for international protection, the practical effect of this provision is unclear.[106] The SBC obliges Member States to collect statistics on the number and nationality of persons refused entry, the grounds for refusal and the type of border (land, air or sea) at which refusal took place. A similar obligation for carriers could give an insight into the extent to which people with justified protection claims are being prevented from boarding.[107]

Specific rules on the position of asylum seekers at the border can be found in the "Procedures Directive."[108] The Procedures Directive is one of the building blocks of the first phase of the creation of a European Common System for Asylum in which the Member States aim to harmonise national legislation and provides for minimum procedural standards for the

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[101] Joint Action 96/197/JHA, *supra* note 40.
[102] Juchno, P. and Albertinelli, A, 'Asylum applicants and decisions on asylum applications in Q4 2008', (Eurostat, Data in focus, 8/2009), 6
[103] See in detail Chapter X.
[104] See *inter alia* Guild, E., 'Moving the Borders of Europe' (Inaugural Lecture, University of Nijmegen, 30 May 2001) and Guiraudon, V., 'Before the EU Border: Remote Control of the "Huddled Masses"', in: Groenendijk, K.., *et al*. (Eds), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 191-214.
[105] Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, *OJ* 2001, L187/45.
[106] Article 4(2), Directive 2001/51/EC, *supra* note 105.
[107] Article 13(5), SBC.
[108] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* 2005, L326/13 (hereinafter: 'Procedures Directive').

granting and withdrawing of the refugee status.[109] Both the UK and Ireland have opted in to the Directive. Article 35 of the Directive deals with procedures at the border or in transit zones. First of all it should be noted that the Directive applies in full to these areas.[110] This is in line with the case law of the European Court of Human Rights which has held that under the ECHR the transit zones do not have extra-territorial status.[111]

Border procedures apply mainly to those applicants who do not meet the conditions for entry into the territory of the Member States.[112] Article 35(1) provides that Member States may introduce procedures to decide on asylum applications in border/transit zones, subject to the basic principles of the Directive. Where such procedures do not exist, they may maintain procedures that deviate from these principles in order to decide on applications in border/transit zones. Paragraph 3 of the same article does require these procedures to be in accordance with a number of safeguards, the most important being the right to remain at the border or transit zone. Moreover, in case permission to enter is refused by a competent authority, this authority has to state the reasons in fact and in law for why the application for asylum is considered as unfounded or as inadmissible. This provision seems to lack all procedural safeguards against easy and arbitrary rejections of asylum claims. Presumably, this decision would have to be in writing as required by Article 13 of the SBC.

To prevent people from remaining in a sort of "no-man's land", Article 35(4) states that Member States must ensure that a decision is taken within a reasonable time. If a decision is not taken within four weeks, the applicant for asylum must be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of the Directive.

The Procedures Directive further allows Member States to decide on asylum applications at locations in the proximity of the border, in case of a massive influx of third country nationals making it practically impossible to decide at the border itself. However, this may be done only where and for as long as these persons are accommodated normally in these locations.[113] It would therefore exclude for instance the possibility of the processing of asylum claims on board vessels.

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[109] European Council Conclusions, Tampere, 15-16 October 1999, point 14. The UK and Ireland have opted-in to the 'Procedures Directive', Denmark does not take part (recital 33, *ibid*).
[110] Note the difference in Case C-170/96, *Commission v Council* [1998] ECR I-3655, paras. 23-24, in which the Court held that Joint Action 96/197/JHA on airport transit arrangements, *OJ* 1996, L63/8 was rightly taken under the Third Pillar, as airport transit did not concern the crossing of external borders.
[111] *Amuur v France* (Appl. No. 19776/92), ECtHR, 25 June 1996, para. 52.
[112] Recital 16, Procedure Directive.
[113] Article 35(5), Procedures Directive.

7. The Next Steps in EU Border Management

In February 2008 the Commission tabled three Communications which together were labelled "the EU Border Package."[114] One of these Communications, "Preparing the next steps in border management in the European Union," contains various options for the future management of the external borders which would not so much change the rules under which people cross the Schengen external borders, as the way in which they do.[115] Although each of these "new tools" still needs to be worked out in detail in legislative proposals, a survey amongst Member States as regards one, the introduction of an entry-exit system, already garnered a broad support amongst the Member States.[116]

The Commission first of all proposed the introduction of a "Registered Traveler Status." This would somewhat mitigate the sharp distinction between EU citizens and TCNs. A registered traveler status would prove that a TCN, be it from a country under visa obligation or not, is a *bona fide* traveler. In their respect the verification of certain entry conditions at the border could be waived.[117] Automated gates would facilitate the entry for both these registered travelers as well as EU citizens in possession of an e-passport, *i.e.* containing biometric identifiers.[118]

One should realize however that the obligation to hold a visa for TCN of countries that are on the visa list will not be affected in any way.[119] Guild has pointed out that, although the list does not directly discriminate on the basis of GDP, the wealth of nations does form an important additional factor of distinction.[120] The registered traveler status seems to fit well with this observation, considering that the well-off elite of countries on the visa list are likely to be the first to benefit from such status. TCNs could apply for the registered traveler status at any of the Member States' consulates. If the system is not to be perceived as arbitrary, a

[114] COM(2008) 67-69 final.
[115] COM(2008) 69 final, *supra* note 4.
[116] Council Document 13403/08.
[117] COM(2008) 69 final, *supra* note 4, 6.
[118] The Commission estimates that by 2019 at the latest all EU passports should have biometric identifiers and that all EU citizens could use automated gates: COM(2008) 69, *ibid.*, 7. The UK and Ireland do not apply Council Regulation (EC) No 2252/2004, on standards for security features and biometrics in passports and travel documents issued by Member States, *OJ* 2004, L 385/375, although passports from these countries will in the near future comply with the same standards on the basis of national legislation: Report by the UK Comptroller and Auditor General, 'Identity and Passport Service: Introduction of ePassports' (HC 152, Session 2006-07, 7 February 2007), 8.
[119] Article 1(1), Council Regulation (EC) No 539/2001, *supra* note 26.
[120] Guild, E., 'The Legal Framework: Who is Entitled to Move?', in: Bigo, D. and Guild, E. (Eds), *Controlling Frontiers: Free movement into and within Europe* (Ashgate, Aldershot, 2005), 19.

well-known complaint in relation to visa application procedures, it would need clear rules on grounds for registration, withdrawal and appeal.

The Commission Communication continues with a discussion of the possible introduction of an entry-exit system. This would entail "the automatic registration of time and place of entry and exit of third country nationals."[121] The Commission envisages a system that covers all TCNs, presumably with the exceptions that are currently contained in Article 10 SBC on the stamping of TCN travel documents.[122] It would store the biometric data of TCN border crossers. TCNs which are under a visa obligation would have already provided their fingerprints when requesting a visa and the Commission suggests that, presumably additional, biometric data could be included in the system at that point.[123] TCNs that are not under a visa obligation would have to provide their data upon first entry, recognising that this could lead to delays at busy border crossing points.[124]

It would probably be easier to introduce a system that would only apply to TCNs under a visa obligation. It could then be introduced by way of amendments to the VIS Regulation and the SBC. The VIS would have to be extended so as to include an entry-exit database and the SBC would have to make checks upon exit mandatory. In that case however, exceptions would have to be made for those TCNs coming from countries that are on the visa list, but who are exempt from the visa-duty. This category would most importantly include TCNs in possession of a Member State's residence card, as well as recognised refugees and stateless persons resident in any Member State and holding a travel document issued by that Member State.[125]

A last option the Commission wishes to explore, the one that is least developed, is the introduction of an electronic system of travel authorisation (ESTA).[126] This system would apply to TCNs coming from countries that are not on the visa list. They would be required to make an electronic application supplying, in advance, data identifying the traveller and specifying the passport and travel details. These data could then be used for "verifying that a

[121] COM(2006) 69, *supra* note 4, 7.
[122] Article 10(3) SBC. Logically, also the exception for a TCN for whom insertion of an entry-exit stamp in the travel documents could cause serious harm would not apply, although this is not specified anywhere.
[123] Article 9(6), VIS Regulation, only refers to fingerprints. One could imagine that, like in the US, biometric data would also include an iris scan. Presumably these data could also be collected where a TCN applies for Registered Traveller Status.
[124] COM(2008) 69, *supra* note 4, 8.
[125] Article 5(2), Directive 2004/38/EC, *supra* note 20 and Article 1(2), Council Regulation (EC) No 539/2001, *supra* note 26.
[126] COM(2006) 69, *supra* note 4, 9.

person fulfils the entry conditions before travelling to the EU, while using a lighter and simpler procedure compared to a visa."[127]

It is not clear whether the Commission would envisage that the denial of travel authorisation would mean an automatic refusal of entry and whether this would be enforced by carriers, as is the case of the EU's visa policy, or only at the external border itself. Under the US electronic system for travel authorization (ESTA), applicable to nationals from countries whose visa duty is waived, someone who is denied authorization could still apply for a visa.[128] The introduction of such a system would in any case require new legislation, and probably an amendment of the SBC.

8. Conclusion

A true "Area of Free Movement" independent of status seems to exist only for those admitted to the Schengen Area for a period of less than three months. The conditions for entry into this area have been laid down in the SBC and the LBT Regulation. They reflect once more the sharp distinction between those that may claim a right of free movement on the basis of EC law, predominantly EU citizens, and TCNs.

One may wonder to what extent the logic of attaining internal free movement allows for checks on EU citizens at the Schengen external borders to be more extensive than at the non-Schengen internal borders. Even before the adoption of the SBC, the ECJ in *Commission v Spain*, gave clear precedence to the EC right of free movement in relation to the Schengen *acquis*. Since this case not merely concerned the intra-Community movement of crossing a Schengen border, but also the crossing of an EU external border, this case supports the position that where an individual is endowed with the right to cross the EU's internal borders, s/he must be allowed to cross the external borders under the same conditions. Nevertheless, the SBC seems to allow for (slightly) more extensive checks at the external Schengen borders, even though it is clearly stated that the rules contained in the regulation are to be without prejudice to the community right of free movement and therefore the Schengen rules on the crossing of the external borders should be read in conformity with the EU law rules on free movement of persons.

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[127] *Ibid*.

[128] Department of Homeland Security, Bureau of Customs and Border Protection: Changes to the Visa Waiver Program to Implement the Electronic System for Travel Authorization (ESTA) Program (Federal Register Vol. 73, No 111, 9 June 2008), 32440.

It becomes clear from the discussion of the SBC and the LBT Regulation that the Schengen external borders form the last point of control before entry to the Schengen area. In the case of a TCN who is under a visa duty, the checks at the external border essentially re-assess whether the conditions for granting a visa are still fulfilled. Likewise, the checks on a TCN border resident in possession of a LBT permit, control whether the conditions for the issuing of such permit are still valid. Second, there is a large margin of discretion for the Member States' competent authorities to bar a TCN's access to the Schengen territory, be this at the border itself, by inclusion in the SIS database or the denial of a visa. In this respect it is to be regretted that the SBC does not provide for a right of entry once all conditions that could bar such entry are not applicable.

A number of specific categories TCNs have been given (limited) free movement rights. Although they clearly fall outside the SBC's definition of persons enjoying the Community right of free movement, at the Schengen external borders their treatment should leave fully effective the rights that they have been accorded under secondary Community legislation. This would justify treatment, which is a far as possible - taking into account of course the more limited nature of their rights - similar to that of the Community right of free movement of persons.

In the absence of a true Common European Asylum System, the Member States remain competent to decide on the entry of asylum seekers, even if they do so within the limits imposed by the Procedures Directive and obligations under international law. The SBC explicitly states that its application is without prejudice to the right to ask for asylum. This chapter has pointed at the most important problem for people in need of international protection may actually be reaching that border. The Commission's proposal for new instruments for border management, such as the ESTA, may only add to this difficulty.

While the measures envisaged by the Commission in its proposal on the future of European border management are in reality instruments for the broader purpose of immigration control, their introduction would change practice at the external borders and would need to be accommodated in the SBC. Although they are presented as facilitating movement across borders and mitigating the somewhat blatant difference in treatment between EU citizens and TCNs, their introduction would not fundamentally change the position in law of TCNs. The introduction of an ESTA and an entry-exit system is even more likely to slow down traffic at the external borders.

VII. The Rationale of EU Border Management Revisited

1. Introduction

In the previous two chapters we have discussed the substantive rules that govern the movement of people across the external borders of both Community and the Schengen area from the point of view of the individual. The Community competences in the area of external border management, although relating exclusively to the Schengen external borders, essentially aim to ensure respect for these rules.

So far, the transfer of powers for the purposes of the management of the Schengen external borders to the EU was described as the necessary corollary of the lifting of controls at the internal borders between Member States. Indeed, this official rationale has become close to an "unchallenged truth", which finds explicit expression in Article 61(a)(c) EC qualifying measures on the external borders as "directly related flanking measures" to the free movement of persons.[1]

However, before we embark on a discussion of the substantive and institutional questions raised by use the EU has made of its competences in the field of external borders management, it is necessary to (re)consider this official rationale. Despite the EU's insistence on the internal market rationale, many have come to question the idea that the EU's border policy is exclusively linked to the free movement of persons. Most importantly, this explanation cannot account for exclusionary nature of this policy area, nor the importance that is has been given.

As early as 1997, so even before the entry into force of the Treaty of Amsterdam, the European Council called upon the Council to consider ways and means to reinforce the security of external borders.[2] Since then the European Council has on many occasions repeated this call for reinforced controls and enhanced operational cooperation at the external borders.[3] Without exception these calls have been linked to the fight against irregular migration and to a lesser extent terrorism and organised crime. The 2007 German presidency

[1] Bigo, D, 'Frontier Controls in the European Union: Who is in Control?', in: Bigo, D. and Guild, E. (Eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Aldershot, Ashgate, 2005), 68.
[2] European Council Conclusions, Vienna, 11-12 December 1998, point 91.
[3] The conclusions of twenty-two out of the thirty-six ordinary European Council meetings held since the entry into force of the Treaty of Amsterdam refer to the management of the external borders, the majority of which in terms of calling for increased operational cooperation.

declared its aim to "further develop the operability of the European Border Management Agency Frontex in order to improve the protection of the external borders of the European Union and intensify border police cooperation."[4]

The importance of external border management within the EU's overall activities is evidenced by the financial resources made available for this purpose. With a commitment of over 282 million euro in the 2008 budget, the policy area covering external borders formed the most important expenditure of the Area of Freedom, Security and Justice (AFSJ). Commitments under this heading amounted to 39.6 percent of the total commitments for the AFSJ, with those for the external borders fund amounting to 23.8 percent of the total, for Frontex 9.5 percent and the Schengen Information System (SIS) 3.7 percent.[5]

Many commentators have argued that a security logic rather than the free movement of persons forms the real driving force behind the EU's preoccupation with the external borders and cooperation in justice and home affairs (JHA) in more general.[6] As part of the AFSJ, the policing function of borders, borders being regarded as important sites of law enforcement, has undoubtedly been given a self-standing importance. An important factor here is the (implicit) linking of irregular migration with security threats. Still, this chapter will not argue that the free movement of persons has become a mere pretext for the reinforcement of the external borders.[7] Rather the internal market rationale needs to be considered together with these and other explanations. One should not forget that the security function of borders forms part of the broader symbolic value of the external borders for both the Member States and the EU. In addition, a lack of progress in related areas of JHA may have contributed to the focus on the external borders as an area in which progress could be more readily achieved.

2. The Internal Market Rationale

According to the official rationale the lifting of internal borders necessitated the external borders to take over the function of "controlling and filtering the entry and identity of persons and ensuring internal security within their territory."[8] The Member States that were to give up

[4] German Ministry of the Interior, 'Interior Ministers strengthen European Border Management Agency Frontex in the fight against illegal migration' (Press Release, 20 April 2007).
[5] With over 166 million, the budget heading "Migration Flows", covering common migration and asylum policies, comes second, with commitments amounting to 23.4 percent of the overall figure for the AFSJ.
[6] See *inter alia* Bigo, D., *supra* note 1 and the authors quoted below.
[7] Bigo, D., *ibid*., 68.
[8] See for instance the Council's website:
http://consilium.europa.eu/cms3_fo/showPage.asp?lang=en&id=460&mode=g&name= .

control over their borders would have an interest in the controls at the external borders taking place under jointly agreed rules and procedures in order to overcome the possible negative consequences of regulatory decisions made by the Member States responsible for the management of their respective part of the external borders.[9]

The above argument gains force where there is lack of trust between the Member States that give up control over their borders and the Member States that become responsible for the management of the common external border. Not without reason the Commission's Communication of 2002 identified mutual confidence between Member States as one of the major needs for the EU's external borders policy.[10]

The issue of trust became particularly important in the context of the EU's 2004 and 2007 enlargements. The requirement to fully implement the provisions of the Schengen *acquis* meant that the acceding countries had not only to adopt the relevant legislation, but also to develop the institutions and infrastructure at their external borders, which under Communism had been relatively open. Moreover, the external borders became both longer, and also shifted to "a regional environment which is frequently more difficult."[11] The decision to lift controls at the internal land and sea borders of 9 out of the 10 Member States that acceded in 2004 was only taken at the end of 2007, nearly a year later than originally foreseen.[12] Despite the fact that positive evaluations of the Council's Schengen Evaluation Working Party lay at the basis of the decision, for many of the EU-10 Member States this still meant taking "a leap of faith."[13]

The EU's enlargements also focussed attention on the question of burden sharing, or more generally solidarity, in the area of management of the external borders. As the Commission noted "[t]he EU faces the challenge of managing land borders stretching to some 6,000 kms, and maritime borders to 85,000 kms. This challenge is distributed unevenly: 7 of the new Member States represent 40 % of our land external borders."[14] To this it should be

[9] Stetter, S., 'Regulating migration: authority delegation in justice and home affairs', 7 *JEPP* 1 (2000), 83.
[10] COM(2002) 233 final, Commission Communication 'Towards Integrated Management of the External Borders of the Member States of the European Union', 4.
[11] *Ibid*.
[12] Council Decision 2007/801/EC on the full application of the provisions of the Schengen acquis, *OJ* 2007, L323/34.
[13] Walker, N., 'The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis', in: Police and Justice Co-operation and the New European Borders (The Hague, Kluwer International, 2002), 31. That this trust is left to be desired can be inferred from various accounts. See e.g. 'Tighten borders, new EU members told' (*The Financial Times*, 9 October 2007), 'Nine new members prepare to join free European travel club' (*The Times*, 19 December 2007), 'Visegrad Four presidents vow common stand on Schengen zone entry' (Radio Prague, 18 September 2006). See also Jordan, B., *et al*., 'Contextualising immigration policy implementation in Europe,' 29 *JEMS* 2 (2003), 198.
[14] COM(2004) 487 final, Commission Communication on the Financial Perspectives 2007-2013, 9.

added that Member States at the external borders may face different migratory pressures depending on their geographical location.[15] The Hague Programme mentioned solidarity as one of its underlying principles and in relation to borders in particular referred to a "fair sharing of responsibility including its financial implications."[16] The Lisbon Treaty will introduce in Article 67(2) TFEU the principle of solidarity between the Member States as the basis for its common policy on asylum, immigration and external border control.

The idea of burden sharing was only explicitly introduced in the Commission's 2002 Communication on Integrated Border Management.[17] Until then it had been largely absent, not only from the discussion on the internal market (neither the Commission's White Paper on the Internal Market, nor the 1988 and 1992 Communications referred to burden sharing), but also from the Schengen cooperation.[18] An explanation for this could be found in the more limited number of Member States having a more homogeneous level of development.[19] In the case of the five initial Contracting Parties of Schengen, only one country, Luxemburg, did not have external land or sea borders.

The 2003 and 2005 Acts of Accession provided for the so-called Schengen Facility, a pre-accession financial instrument for the implementation of the Schengen *acquis* and border control activities on the new EU external borders.[20] This however constituted pre-accession aid and was meant to bring controls at the external borders up to standard, rather than to provide for a more permanent instrument of burden sharing. It should be pointed out that, not

[15] The impression is often that most migration takes place by African immigrants trying to cross either the Mediterranean or Atlantic. According to officials of Frontex however in terms of numbers the migratory pressure by air (from South America) and over land (from Asia, transiting the Balkan countries) is much more significant: 'Ich weiß, für einige sind wir die Bad Guys' (*Suddeutsche Zeitung*, 6 December 2007). This does not take away from the fact that migration at the southern maritime borders puts a particular heavy burden on the reception capacities of certain Member States (Malta) or regions (Lampedusa, Canary Islands).

[16] The Hague Programme, Annex to the European Council Conclusions, Brussels, 4-5 November 2004, point 1.7.1.

[17] COM(2002) 233, *supra* note 10, in particular at 24.

[18] Two exceptions can be found in Articles 24 and 119 CISA. Article 24 determines that Contracting Parties shall compensate each other for any financial imbalances which may result from the obligation to expel an alien who no longer fulfils the condition for regular stay where such expulsion cannot be effected at the alien's expense. Article 119 states that the cost for the SIS are to be born jointly by the Contracting Parties, on the basis of the rate for each Contracting Party applied to the uniform basis of assessment of value added tax within the meaning of Article 2(1)(c) of the Decision of the Council of the European Communities of 24 June 1988 on the system of the Communities' own resources. In neither case however is the question of burden sharing based upon factors related to the obligation to manage parts of the common external borders itself.

[19] Hobbing, P., 'Management of External EU Borders: Enlargement and the European Border Guard Issue', in: Caparini, M. and Marenin, O. (Eds), *Borders and security governance: managing borders in a globalised world* (Zurich, Lit, 2006), 174.

[20] Article 35, Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic, *OJ* 2003, L236/33 and Article 32, Act of Accession of Bulgaria and Romania, *OJ* 2005, L157/203.

in the least due to budgetary constraints, redistributive instruments have been adopted only rarely, usually in the context of complex package deals.[21]

When in the early 1990s several Member States faced a considerable influx of asylum seekers, this did not result in a call for more burden sharing in the area of border management, nor did a rise in immigration at the southern maritime borders in the late 1990s.[22] In the summer of 2006 however, the migratory pressure experienced by the Mediterranean Member States was said to have created a "sufficient critical mass" in the Council for a financial burden sharing agreement, the External Borders Fund.[23]

The internal market rationale draws on the neo-functionalist theories on European integration in which cooperation on the management of the external borders forms the spill-over from the non-controversial internal market project to other sectors of possible greater political salience.[24] The UK's persistent opposition to the lifting of internal border checks shows however that this was itself a question of great political salience, rather than a mere technical element of the internal market project.

Former British Prime Minister Margaret Thatcher formulated the UK's opposition in her famous Bruges speech as follows: "[…] it is a matter of plain commonsense that we cannot totally abolish frontier controls if we are also to protect our citizens from crime and stop the movement of drugs, of terrorists, and of illegal immigrants."[25] What is interesting then is that the spill-over from internal market to external borders could only take place on the basis of a similar logic: the idea that the lifting of internal borders triggered a security question.[26]

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[21] Thielemann, E., 'Symbolic Politics or Effective Burden-Sharing? Redistribution, Side-payments and the European Refugee Fund', 43 *JCMS* 4 (2005), 808.

[22] Instead, in the early 1990s solutions were sought within the rules on asylum, with the signature of the Dublin Convention (*OJ* 1997, C254/1), establishing the Member State responsible for an asylum claim, and the application of the safe third country concept (see e.g. Council Resolution of 30 November 1992 on a harmonised approach to questions concerning host third countries, "London Resolution"). In the late 1990s one does see the first calls for a reinforcement of the external borders appear in the conclusions of the European Council meetings.

[23] Decision No 574/2007/EC establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', *OJ* 2007, L144/22. Monar, J., 'Justice and Home Affairs', in: Sedelmeier, U. and Young, A. (Eds), *JCMS Annual Review of the European Union in 2007* (Oxford, Blackwell, 2008), 113.

[24] See *inter alia*: Anderson, M. *et al*., *Policing the European Union* (Oxford, Clarendon Press, 1995), 93-96, Huysmans, J., *The Politics of Insecurity: Fear, migration and asylum in the EU* (London, Routledge, 2006), 87, Lodge, J., *The European Community and the Challenge of the Future* (London, Pinter, 1993), Introduction, xix, Müller, T., *Die Innen- und Justizpolitik der Europäischen Union – Eine Analyse der Integrationsentwicklung* (Opladen, Leske + Budrich, 2003), 104 ff. It should be recalled that the Single European Act did not provide the EC with express competences for the regulation of the external borders.

[25] Opening Lecture College of Europe, Bruges, 20 September 1988.

[26] Huysmans, J., *supra* note 24, 87.

As was already stated in the introduction, the internal market rationale alone fails to explain the importance attributed to this policy field. Neither does it account for the nature of EU action in this area. The focus of the EU's policy for the management of the external borders is very much on a strict application of the Schengen rules, the prevention of irregular migration and a reinforcement of controls. Yet, as Costello has put it: "any internal market rationale is agnostic as to the restrictiveness or otherwise of external barriers, but simply requires the application of common rules."[27] Likewise, the link between the lifting of checks at the internal borders, enlargement and burden sharing alone cannot fully explain the adoption of solidarity instruments.

3. The Police Function of Borders

While the UK opposed the lifting of checks at the internal border, it was never against increased cooperation on the external borders itself, as was recently evidenced by its wish to fully participate in the Regulation establishing the EU's border agency Frontex.[28] As Bigo has noted, the disagreement in the debate on the conclusion of the Schengen Agreements concerned the effectiveness of cooperation in law enforcement, in particular as regards controls at the external borders as a substitute for internal border controls.[29] It is interesting that in its White Paper on the completion of the internal market, the Commission on the one hand downplayed the importance of controls at the *internal* borders in stating that they were "by no means the only or indeed the most effective measures in relation to terrorism and drugs," yet on the other hand argued that improved controls at the *external* borders could form an alternative means of protection against such threats.[30]

As the Council has stated: "[f]irst and foremost, border management is an area of policing, where security interests have to be met […]."[31] It can be argued that the border's police function gained importance after the collapse of Communism. First of all the border

[27] Costello, C., 'Administrative Governance and the Europeanisation of Asylum and Immigration Policy,' in: Hofmann, H. and Türk, A., *EU Administrative Governance* (Cheltenham, Edward Elgar, 2006), 289-290.
[28] Case C-77/05, *UK v Council* [2007] ECR I-1145.
[29] Bigo, D, *supra* note 1, 68.
[30] COM(85) 310 final, 10. COM(88) 640 final, the Commission Communication on the abolition of controls of persons at the Intra-Community borders, stated in even stronger terms: "Anyone with intimate knowledge of these matters knows that the present frontier controls are ineffective," 3. A similar contradiction exists for the UK government, whose main support for the Common Travel Area with Ireland seems to have been informed by the realisation of practical impossibility of fully controlling the UK-Ireland land border: Ryan, B., 'The Common Travel Area between Britain and Ireland', 64 *MLR* 6 (2001), 870.
[31] SCIFA Room Document, Non-paper from the Presidency on integrated border management, 5 July 2006 (Council Document 11901/06).

lost much of its military character.[32] Secondly, security became a much wider concept, as the focus of concern shifted from military threats to new risks, such as political, societal, economic and ecological threats.[33] As Grabbe put it: "the fear of tanks and missiles arriving from across the Iron Curtain [was] supplanted by anxiety about uncontrolled migration and cross-border crime."[34] In this process, concerns of external security became increasingly linked to questions of internal security, *i.e.* external security threats, whilst no longer jeopardizing the territorial integrity of the state, were increasingly perceived to endanger internal security.

The perception that borders can act as barriers to outside threats to internal security shows clearly in the global response to terrorism. UN Security Council Resolution 1373 (2001), adopted shortly after the 9/11 attacks, decided that all States should prevent the movement of terrorists or terrorist groups by effective border controls. The Conclusions of the Extraordinary Justice and Home Affairs Council meeting held in Brussels on 20 September 2001 echoed the approach taken in the UN Security Council by inviting the competent authorities of the Member States to strengthen controls at external borders.[35] In the United States the 9/11 Commission Report put much emphasis on the improvement of the US' border and immigration system.[36] The Report also stated that extending standards for screening travellers to other governments could "dramatically strengthen America's and the world's collective ability to intercept individuals who pose catastrophic threats."[37] Many of the measures the EU has introduced since, or that are currently being prepared, are similar to legislative developments in the US, such as the exchange of Personal Name Record (PNR) data, the introduction of biometric data in travel documents and the establishment of an entry-exit system.[38]

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[32] Bigo, D., *supra* note 1, 55.
[33] Buzan, B., *People, States and Fear, An Agenda for International Security Studies in the Post-Cold War Era* (London, Harvester Wheatsheaf, 1991), 208.
[34] Grabbe, H., 'The Sharp Edges of Europe: extending Schengen eastwards', 76 *International Affairs* 3 (2000), 520.
[35] Conclusions of the Extraordinary JHA Council, Brussels, 20 September 2001, point 24 (Council Document SN 3926/6/01 REV 6).
[36] Final Report of the National Commission on Terrorist Attacks Upon the United States (Washington D.C., 26 July 2004), 383 ff.
[37] *Ibid*., 387.
[38] See for the content of these measures Chapter VIII. For more detail: Argomaniz, J., 'When the EU is the 'Norm-taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms' 31 *JEI* 1 (2009), 119-136. The author identifies three interrelated stages: unilateral and forceful norm advocacy by the USA, negotiation and bargaining and, eventually, norm mirroring. See also Zaiotti, R., *Cultures of Border Control: Schengen and the Evolution of Europe's Frontiers* (PhD thesis, University of Toronto, 2008), 285 ff. and Hobbing, P. and Koslowski, R., 'The Tools called to support the 'Delivery' of Freedom, Security and Justice: A Comparison on Border Security Systems in the EC and in the US' (EP Briefing Paper, February 2009, PE 410.681).

The link made between terrorism and the movement of people across borders is evident in many of EU policy documents. The Laeken European Council conclusions stated that the better management of the external borders would not only help fight terrorism, but also illegal immigration networks and the traffic in human beings.[39] In the Declaration on combating terrorism of 25 March 2004, shortly after the Madrid bombings, the European Council emphasised that "improved border controls and document security play an important role in combating terrorism."[40] The 2005 European Union Counter-Terrorism Strategy, stated that Union had to "enhance protection of [its] external borders to make it harder for known or suspected terrorists to enter or operate within the EU."[41] The impact assessment accompanying the Commission's Communication on the setting up of a European Border Surveillance System (EUROSUR), stressed that "[a]n effective border management system both at national and European level contributes significantly to reducing the risks of known or suspect terrorists entering the European Union from the outside and is also a valuable tool for fighting cross-border crime."[42]

As Guild has correctly noted in relation to the emphasis on borders in relation to the fight against terrorism, by placing security in a territorial framework, the right to cross borders has become a security issue.[43] Borders have always been "the sites at which the sovereign authority of the state to exclude is exercised." In this respect the function of borders is not merely one of policing, but also of regulating the entry and exit of *bona fide* travellers.[44] According to Sassen the sovereignty of the state and border control are at the heart of developed countries' policies for the regulation of migration.[45] Since border management is seen as part and parcel to migration management, whenever migration rises up the political agenda border management is likely to follow suit. One of the reasons then for the growing salience of migration is its framing in terms of a security question. This in turn has reinforced the police function of borders as opposed to their regulatory function.

[39] European Council Conclusions, Laeken, 14 and 15 December 2001, point 42.
[40] European Council Declaration on combating terrorism, Brussels, 25 March 2004, point 6.
[41] Council Document 14469/4/05.
[42] SEC(2008) 151, 12.
[43] Guild, E., 'International Terrorism and EU Immigration, Asylum and Border Policy: The Unexpected Victims of 11 September 2001', 8 *EFARev* 3 (2003), 332.
[44] Geddes, A., 'Europe's Border Relationships and International Migration Relations', 43 *JCMS* 4 (2005), 788. See also Chapter II.
[45] Sassen, S., *Losing Control: Sovereignty in an Age of Globalization* (New York, Columbia University Press, 1996), 69.

4. The Securitisation of Migration

It is striking to see that in the Commission's White Paper on the Internal Market migration did not explicitly feature as a security problem that would result from the lifting of internal border checks.[46] The statements attached to the Single European Act (SEA) do refer to the need to "control migration", but there is not yet talk of "the fight against irregular migration." Even the 1988 Commission Communication gives the reason for identity checks at the external borders as being to combat drug trafficking, terrorist activities and organized crime "by non-Community or Community nationals".[47] The initial Schengen Agreement only contained three references to immigration, although "irregular migration" was as such juxtaposed to security issues as crime, terrorism and drugs traffic.[48] In the negotiations leading up to the conclusion of the Convention Implementing the Schengen Agreement (CISA) migration as a security concern came to dominate the discussion of the four Schengen groups in charge of the implementation agreement.[49]

The process of securitisation of migration has been described in detail by social scientists.[50] Huysmans has argued that security knowledge is politically significant as an instrument in struggles for political power and legitimacy as well as an important resource for policy making and implementation.[51] Securitisation may take place at the level of political discourse or policy praxis. Put differently it can take place at two distinct levels of the political system, namely the systems of politics and administration.[52] Securitisation at either of these levels can occur in two ways. The first takes the form of a speech act, which frames migration as an existential threat and legitimises exceptional policies, the second takes the form of a security practice, which ties together various disparate security concerns into a single "(in)security

[46] COM(85) 310 final, Commission White Paper, 'Completing the Internal Market.'
[47] COM(88) 640 final, *supra* note 30, 11.
[48] Articles 7 and 17 of the Schengen Agreement.
[49] Guiraudon, V., 'The EU "garbage can": Accounting for policy developments in the immigration domain' (Paper presented at the Conference of the European Community Studies Association, Madison, 29 May-1 June 2001), 10.
[50] See *inter alia* Huysmans, J., *supra* note 24, Bigo, D., 'Security and Immigration: Toward a Critique of the Governmentality of Unease', 27 *Alternatives*, Special Issue (2002), 63-92, Kostakopolou, T., 'The "Protective Union": Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe', 38 *JCMS* 3 (2000), 497-518, Ceyhan, A., and Tsoukala, A., 'The Securitisation of Migration in Western Societies: Ambivalent Discourses and Policies', 27 *Alternatives* (Special Issue) (2002), 1-39, Ibrahim, M., 'The Securitisation of Migration: A Racial Discourse', 43 *IM* 5 (2005), 163-187.
[51] Huysmans, J., *supra* note 24, 42.
[52] Boswell, C., 'Migration Control in Europe After 9/11: Explaining the Absence of Securitisation,' 45 *JCMS* 3 (2007), 591.

continuum," facilitating the transfer of security practices from one policy area to another.[53] The first has been referred to as "the politics of exception", the latter as the "politics of unease."[54] The two levels may influence one another in different ways. A political discourse may provide legitimacy to certain policies, while security actors may participate in the "verbal or non-verbal reproduction of a security discourse" when implementing policy.[55] Huysmans has further argued that security practices and available technologies often already exist in one form or another and as such inform policy decisions rather than being the result thereof.[56]

It may be argued that there is an additional level at which securitisation may take place, namely that of the law. Although legally binding norms can be considered a product of politics, which are then applied by the administration, laws do not necessarily have to coincide with political discourse. Moreover, it is the law that sets the boundaries within which administrative action is legitimate.

The clearest example of securitisation in the law would of course be the criminalisation of certain activities which were previously legal, such as irregular entry or stay. More subtly however, the law can bring together disparate security concerns within one single legal framework, creating a security continuum, as was the case with the Maastricht Treaty. The law may also be used to legitimize previously existing security practices.

Securitisation in law does however not always have to take the shape of law making. It may rather manifest itself in the interpretation and application of the law. The use of migration law in place of criminal law for instance has largely taken place without any substantive changes in the law.[57]

It is commonly accepted that Schengen was largely shaped by security professionals who "mobilize and institutionalize security knowledge and routines."[58] Schengen brought together the internal security officials of the various rather disconnected *ad hoc* bodies and working

[53] Huysmans, J. and Buonfino, A., 'Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK', 56 *Pol Stud* 4 (2008), 782, Bigo, D., *supra* note 50, 65, Buzan, B. *et al*., *Security: A New Framework for Analysis* (London, Lynne Rienner, 1998), 26.
[54] Huysmans, J. and Buonfino, A., *ibid.*, 767.
[55] Boswell, C., *supra* note 45, 593, Diez, T., 'Opening, Closing: Securitisation, the War on Terror and the Debate about Migration in Germany' (Paper for discussion at the MIDAS/SWP workshop on Security and Migration, Berlin, 9 March 2006), 6.
[56] Huysmans, J., *supra* note 24, 8-9.
[57] Dauvergne, C., 'Security and Migration Law in the Less Brave New World', 16 *Soc & Leg Stud* 4 (2007), 541. 533-549. See also Brouwer, E., 'Immigration, Asylum and Terrorism: A Changing Dynamic, Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09', 4 *EJML* 4, 399-424.
[58] Huysmans, J., *supra* note 24, 82. Bigo, D., *supra* note 50, 77.

groups that had developed in the area of JHA cooperation since the mid-1970s, first in the negotiations on the CISA, then within the various working groups under the umbrella of the Schengen Executive Committee.

Guiraudon has described how politicians showed little interest in the negotiations on the CISA and how the Ministries of the Interior took on an increasingly important role, at the expense of the Ministries of Foreign Affairs.[59] She has argued that for the Ministries of the Interior, Schengen formed a new policy venue which was sheltered from national legal constraints and conflicting policy goals.[60] A more banal, but nevertheless important element should be added, namely the fear of many professionals of internal security, in particular border and customs police, that they might loose their jobs at the (internal) border.[61]

The creation of a security continuum in the CISA was mirrored in the Prüm Convention, concluded on 27 May 2005 by seven EU Member States – the Benelux countries, Germany, Austria, France and Spain.[62] In their own understanding, the Contracting Parties sought to play a pioneering role in the reinforcement of cross-border cooperation in the area of the fight against terrorism, cross-border criminal activities and illegal immigration. The Prüm Treaty is also referred to as Schengen III. Indeed, the treaty is given legitimacy under the very same logic as the Schengen Agreements, namely as a laboratory for future European integration.[63] An important difference with the initial Schengen Agreements is not so much the more explicit linking of terrorism, cross-border crime and illegal migration, but the clear policing objective of the Treaty.[64]

[59] Guiraudon, V., *supra* note 49, 13.
[60] Guiraudon describes the incorporation of the Schengen *acquis* by the Treaty of Amsterdam as a "revenge" by the Ministries of Foreign Affairs, who negotiate Treaty amendments, *ibid.*, 10. See on the conflicts of competence in relation to the Schengen Agreements between the Federal Chancellery and the Ministry of the Interior: Baumann, M., Der Deutsche Fingerabdruck: Die Rolle der deutschen Bundesregierung bei der Europäisierung der Grenzpolitik (Baden-Baden, Nomos, 2006), 147 ff.
[61] Bigo, D., *supra* note 29, 67.
[62] Convention between Belgium, Germany, Spain, France, Luxembourg, The Netherlands and Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed in Prüm (Germany), 27 May 2005 (See for an English translation of the Treaty: Council Document 10900/05 of 7 July 2005). Most provision of the Treaty have now been incorporated in EU law by Council Decision 2008/615/JHA, on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, *OJ* 2008, L210/1 and Framework Decision 2008/616 on the implementation of Decision 2008/615/JHA, *OJ* 2008, L210/12.
[63] Monar, J., ''The Area of Freedom, Security and Justice: Institutional and Substantial Dynamics in the perspective of the European Union', 22 *Collegium* (December 2001), 13. See the preamble and Article 1(4) of the Prüm Convention, *ibid*.
[64] There is only a loose reference to the free movement of persons in the first preamble, stating that in an area of free movement it is important to enhance cooperation on crime, terrorism and irregular migration.

5. The Practice of Securitisation in the European Union

In the EU Member States one can observe a securitisation of migration from the 1990s onwards. The fear of "hordes of immigrants" coming from former Communist countries was soon replaced by a fear of "floods" or "waves" of immigrants arriving from the African continent by boat. A country in which this rhetoric has been particularly strong is Italy, where Prime Minister Silvio Berlusconi in 2002 declared a state of emergency in response to the "continuous, massive inflow of foreigners that reach Italy irregularly."[65] In terms of securitisation in practice, one of the clearest examples can be found in Spain. In 2002 the Spanish government inaugurated a high-tech 300-million-euro border surveillance system called SIVE for the Strait of Gibraltar which has since been expanded along its southern borders.[66] Furthermore, one can observe an increasing involvement of paramilitary and military forces in the management of borders in the Mediterranean and the Atlantic.[67]

At the EU level, the securitisation of migration has predominantly taken the form of a security practice creating an "(in)security continuum" linking security problems such as terrorism, drugs and cross-border crime with questions of migration and asylum.[68] The construction of the Third Pillar of the European Union introduced for the first time a security continuum, analogous to that created by Schengen, into the EU's constitutional structure. After the transfer of policies relating to migration and asylum to the First pillar, the introduction of the AFSJ preserved this continuum by bringing it under a single EU objective. The Lisbon Treaty will subject this continuum to an increasingly uniform substantive and institutional legal framework.

Examples of the security continuum in EU policy documents are not hard to find. The Commission in its Communication on the development of a European Border Surveillance System (EUROSUR) stated that: "Border surveillance has not only the purpose to prevent

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[65] 'Immigrati, deciso lo stato di emergenza, Fini: il governo riferisca a Montecitorio' (*Corriere Della Sera*, 25 July 2008). In 2002, 23.719 irregular migrants disembarked on the Italians coasts: Coslovi, L., 'Breve note sull'immigrazione in Italia e in Spagna' (Rome, CeSPI, January 2007). The "state of emergency" has since become virtually permanent through its continued extensions. See latest: Decreto del Presidente del Consiglio dei Ministri, 18 December 2008, Proroga dello stato di emergenza per proseguire le attività di contrasto all'eccezionale afflusso di extracomunitari, *GU* No 1, 2 January 2009.

[66] 'Spain's Border Surveillance System Remains Controversial' (*Deutsche Welle*, 29 October 2007). This expansion is reflected in the changing meaning of the abbreviation SIVE: whereas it initially stood for Integrated System for the Vigilance of the Strait, it now stands for Integrated System of Exterior Vigilance.

[67] Lutterbeck, D., 'Between Police and Military: The New Security Agenda and the Rise of Gendarmeries' 39 *Cooperation and Conflict* 1 (2004), 52 and Lutterbeck, D., 'Policing Migration in the Mediterranean', 11 *Mediterranean Politics* 1 (2006), 65.

[68] Huysmans, J., *supra* note 24, 71 and Bigo, D., *supra* note 24, 65

unauthorised border crossings, but also to counter cross-border crime such as the prevention of terrorism, trafficking in human beings, drug smuggling, illicit arms trafficking, etc."[69] It echoes the Hague Programme which called for "a continuum of security measures" strengthening the fight not merely against illegal immigration, but also helping to prevent and control crime, in particular terrorism and which held that "Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole".[70]

In order to illustrate the securitisation of migration at EU level it may be interesting to look more closely at the EU's approach to one of the most publicized immigration questions it has been faced with over recent years, namely the perilous journey undertaken by immigrants in an attempt to reach Europe over the Mediterranean or the Atlantic.[71]

On the one hand the discourse at the EU level frames the situation at the EU's southern maritime borders predominantly as a humanitarian crisis.[72] Without exception the European institutions have qualified the situation as a tragedy.[73] On the other hand however, notwithstanding its humanitarian nature, the mere fact that the situation is qualified as a crisis or emergency is itself significant.[74]

A solution to this humanitarian problem is without exception linked to the fight against irregular migration.[75] JLS Commissioner Franco Frattini has in this respect referred to the European borders as a first "line of defence" to control illegal migration.[76] The EU's repeated commitment to the rules on international protection and *non-refoulement* have

[69] COM(2008) 68 final, Commission Communication, 'Examining the creation of a European Border Surveillance System (EUROSUR)', 3.
[70] The Hague Programme, *supra* note 16, point 1.7.2. and Introduction.
[71] Reports in the media on the arrival of boat migrants at the southern maritime border are numerous. The website http://www.noborder.org/dead.php documents incidents where immigrants have died while trying to enter Europe on the basis of such reports. See for an in-depth analysis: De Haas, H., 'The myth of invasion: Irregular migration from West Africa to the Maghreb and the European Union' (Oxford, IMI Research Report, October 2007).
[72] See for instance the Draft Council Conclusions on reinforcing the EU's Southern Maritime Borders (Council Document 13559/06) and the European Council Conclusions, Brussels, 18-19 June 2009, point 37.
[73] See for instance The Hague Programme, *supra* note 16, point 1.6.1, the Draft Council Conclusions on further reinforcing the EU's Southern Maritime Borders (Council Document 12712/1/07 REV 1), the public hearing on 'Tragedies of Migrants at sea' held by the LIBE Committee of the European Parliament, 3 July 2007 and COM(2006) 733 final, Commission Communication on the Reinforcing the management of the European Union's Southern Maritime Borders, 3.
[74] The Committee of the Regions for example declared that: "Europe is undergoing the "greatest migratory emergency in its history": Opinion of the Committee of the Regions on the Policy Plan on legal migration, fight against illegal immigration, future of the European Migration Network, *OJ* 2007, C146/3. See also the European Council Conclusions, Brussels, 18-19 June 2009, point 36.
[75] European Council Conclusions, *ibid*.
[76] 'Recent developments of immigration and integration in the EU and on recent events in the Spanish enclave in Morocco' (speech at the Konrad Adenauer Foundation, Brussels, 3 November 2005).

occasionally been offset by a questioning of the mixed nature of the migrant flows.[77] The European Border Agency Frontex, which coordinates joint patrols by the Member States in the Atlantic and the Mediterranean has repeatedly pointed out that search and rescue activities are outside their scope of competence.[78]

Frontex considers that most irregular migration is orchestrated by organised crime groups.[79] Research by Pastore *et al.* concludes that the smuggling organisations active in the organisation of crossings by sea to Italy are "often little more than loose networks linking largely independent clusters of practical competences".[80] Although such loose networks would still fit the definition of organised criminal Group under the UN Convention against Transnational Organised Crime, the image that is invoked by the reference to organised crime is rather one of a hierarchically structured organisation.[81] The Palermo protocols to this convention, on human trafficking and smuggling respectively, have been referred to as a legal basis for action against irregular migration by sea and it has been proposed that they be "complemented and strengthened by bilateral or regional instruments inspired by existing examples regarding the fight against terrorism and against the smuggling of drugs."[82]

The language used, in particular by the Commission and Frontex, on occasion evokes the image of a battle. "We want boats, helicopters, planes in order to be ready for spring, and no later than that," Commissioner Franco Frattini stated at the beginning of the informal JHA Council Meeting in Dresden in January 2007.[83] During joint operations coordinated by Frontex military vessels and aircrafts have been deployed.[84] There is moreover a strong focus on the introduction of surveillance technology.[85]

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[77] This mixed nature is recognised by the Commission in its Communication on the Reinforcing the management of the European Union's Southern Maritime Borders: COM(2006) 733, *supra* note 73, 4. Frontex Executive Director Ilkka Laitinen has however been quoted: "Das sind keine Flüchtlinge, sondern illegale Migranten": 'Frontex ist ein Sündenbock' (*Der Standard*, 21 December 2006).

[78] Ilkka Laitinen, Executive Director Frontex, 'Frontex: Facts and Myths' (Frontex Press Release, 11 June 2007). See in more detail Chapter IX.

[79] See for instance the references to organised crime in the Report of the Frontex-led EU Illegal Immigration Technical Mission to Libya, 28 May-5 June 2007.

[80] Pastore, F. *et al*., 'Schengen's Soft Underbelly? Irregular Migration and Human Smuggling Across Land and Sea and Sea Borders to Italy', 44 *IM* 4 (2006), 114.

[81] Article 2(a), UN Convention against Transnational Organised Crime: "a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". See also: UNODC, 'Organized Crime and Irregular Migration from Africa to Europe' (July 2006), 13.

[82] SEC(2007) 691, Commission Staff Working Document, 'Study on the international law instruments in relation to illegal immigration by sea', point 2.4.2. See in detail Chapter X.

[83] 'Frattini urges Interior Ministers to strengthen FRONTEX' (*Agence Europe*, 16 January 2007).

[84] This may be in part explained by the extra-territorialisation of controls from the territorial waters to the high seas (see Chapter X), which requires different equipment that the military (naval forces) are more likely to

This sense of urgency is underlined by the application of the European Rapid Reaction Mechanism, set up to provide for immediate responses to crisis situations which threaten to destabilise third countries.[86] The need for the EU to develop the capacity to respond swiftly has also been the driving force behind the adoption of Regulation (EC) No 867/2007 providing for a mechanism for the deployment of Rapid Border Intervention Teams. These teams consist however of border guards rather than of aid workers or asylum experts.

It may be concluded that in relation to the situation at the southern external borders the securitisation of migration is visible in discourse, law and practice. While it must be predominantly qualified as a "politics of unease" linking migration with other security threats in a rather subtle way, the imagery used by law and policy makers and the adoption of legislation for "exceptional situations" also shows that elements of the "politics of exception are present."[87]

The securitisation theory has received critical attention recently from authors who argue that the migration policy in the EU is less securitised than is generally assumed.[88] Boswell argues that both politicians and security officials have a limited interest in securitising migration, since policy goals may be conflicting, and their credibility may be at stake when they do not manage to deliver upon expectations.[89] An interesting example here is that Italy agreed to the lifting of internal border checks with 9 of the 10 new Member States at a time at which national politicians and the media were speaking of a "security crisis", triggered by the violent murder of an Italian woman by a Romanian national.[90] In response to this crisis, the Government adopted a Decree-Law on the expulsion of foreign nationals, including EU citizens.[91] The Italian government did not raise the point that the lifting of internal border

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possess. Nevertheless, linking the military to migration control clearly contributes to the establishment of a "security continuum."

[85] COM(2005) 621 final, Commission Communication on Priority actions for responding to the challenges of migration: First follow-up to Hampton Court, 5: "the EU must look into the technical feasibility of establishing a surveillance system to eventually cover the whole of the Mediterranean Sea" and COM(2008) 68 final, *supra* note 69, 5 referring to the the creation of "a common information sharing environment between the relevant national authorities." See chapter VIII.

[86] Commission Press Release, 'Mauritania: new measures to combat illegal immigration towards the EU', 10 July 2006 (IP/06/967).

[87] As Huysman, J. and Buonfino, A., *supra* note 53.

[88] See e.g. Boswell, C., *supra* note 52 and Leonard, S., 'The "Securitisation" of Asylum and Migration in the European Union: Beyond the Copenhagen School's Framework' (Paper presented at the SGIR Sixth Pan-European International Relations Conference, Turin, 12-15 September 2007).

[89] Boswell, C., *ibid.*, 592.

[90] Council Decision 2007/801/EC, *supra* note 12 of 6 December 2006.

[91] Decreto-Legge, No 181, 1 November 2007, Disposizioni urgenti in materia di allontanamento dal territorio nazionale per esigenze di pubblica sicurezza, *GU* No 255, 1 November 2007. See: Pastore, F., 'Se un delitto fa tremare l'Italia: Come si affronta una *security crisis*', *Italiani Europei* 5 (2007), 19-32. According to the Italian

controls would render its policy of expulsion less effective, which is not difficult to understand in view of the highly symbolic significance of the decision and the political repercussion this would have had.[92]

At the EU level however, the question of conflicting interests may be less pronounced since a security discourse may be beneficial to foster integration in the field of irregular migration, while progress in the area of regular migration is much more difficult to achieve.[93] As Walker has noted, the achievement of successful solutions is more probable where concurrent national interests within the collective framework can be mobilised against external threats to those interests.[94]

Boswell further warns not to read too much rationality into organisational action.[95] One may indeed wonder why, if agencies indeed have an interest in expanding their fields of competence, the European Border Agency Frontex has been extremely cautious about accepting tasks that relate to the search and rescue of irregular migrants at sea. However, this task is only remotely related to the field of law enforcement and the Agency has sought to increase its involvement in the field of police cooperation, also participating in various meetings of JHA agencies.[96]

6. The Symbolic Function of Borders

One must realise that there are important practical limits which prevent the control of every single person passing the border. A lack of appreciation for the complexity of the movement of people across boundaries is evident in the Commission's Policy Plan on Asylum, which states that the EU should "focus its efforts on facilitating the managed and orderly arrival on the territory of the Member States of persons justifiably seeking asylum (…)."[97] In fact, those

government the decree-law stayed within the limits of the provisions on expulsion of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* 2004, L158/77.

[92] Note however that this decision did not include the lifting of border checks with Romania. The new Italian Minister of the Interior Maroni, shortly after the coming into power of the centre-right government of Prime Minister Berlusconi in May 2008, did publicly call for the reinstatement of border controls, in response to the alleged criminal activity by the Roma minority of Romanian nationality: 'Maroni, un piano anti-romeni: "Ridiscuteremo le regole Ue"' (*La Repubblica*, 10 May 2008).

[93] See below, Section 8.

[94] Walker, N., 'In search of the Area of Freedom, Security and Justice: A constitutional Odyssey', in: Walker, N. (Ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), 20.

[95] Boswell, C., *supra* note 52, 593.

[96] See Chapter IX.

[97] COM(2008) 360 final, Policy Plan on Asylum: An integrated Approach to Protection across the EU, 10-11.

that argue against a fortress Europe and those that are arguably constructing it are both mistaken in their "overestimation of the regulatory capacities of modern states".[98]

In the case of increased border controls "the cure may actually be worse than the disease" resulting in considerable delays at the border resulting in damage to the economy.[99] It is also worth recalling that it is widely assumed that many, if not most, irregular immigrants enter EU territory legally and only become irregular immigrants after having accessed EU territory by overstaying their visa.[100] The perpetrators of terrorist activity may well be nationals or long-term residents of the countries in which they intend to strike, as was the case with the London bombings of 2005.

The real importance of the EU's external borders can therefore be said to be symbolic rather than real. This significance is linked to, but goes beyond the perceived security function of these borders. In Chapter II it was argued that sovereignty and its key element territory, continue to have great importance. These notions inform law and policy making not only at Member State level, but also underpin the objective of an Area of Freedom, Security and Justice.

We already noted that borders are typically sites of territorial exclusion. European law has limited a Member State's right to deny entry to persons of a nationality other than its own, to a right to deny entry of non-EU citizens. The underlying logic of physically excluding the "other" is however the same. It is this logic which is not only transposed to the external border, but is also reflected in Member States' reluctance to give up the power to decide to whom give access to their territory.[101] Moreover, the Italian "expulsion-decree" discussed earlier underlines how the idea of excluding unwanted aliens from a Member State's territory continues to inform policy making and public opinion even within a "borderless" Europe.[102]

Even if the effectiveness of border controls may be questioned, it was already noted in Chapter II that "states generally have no choice but to assert the prerogative of sovereignty

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[98] Harvey, C., 'Dissident Voices: Refugees, Human Rights and Asylum in Europe', 9 *Soc Leg Stud* 3 (2000), 378 and Bigo, D., *supra* note 1, 75.

[99] Flynn, S., 'Beyond Border Control', 79 *Foreign Affairs* 6 (2000), 58.

[100] Düvell, F., 'Undocumented Migration in Europe: a Comparative Perspective', in: Düvell, F. (Ed.), *Illegal Immigration in Europe. Beyond Control* (Houndmills, Palgrave Macmillan, 2005), 175. The Pew Hispanic Centre has estimated that in the US as much as 45% of the total unauthorised migrant population entered the country legally with visas allowing temporary stay: 'Modes of Entry for the Unauthorized Migrant Population' (Fact Sheet, 22 May 2006). In Australia, which has comprehensive checks on arrivals and departures, overstayers were by far the biggest category of irregular migrants: House of Lords Select Committee on the EU, 'A Common Policy on Illegal Migration' (HL Paper 187, Session 2001-02, 37th Report, 28 November 2002), 11.

[101] This is well illustrated by the case law regarding the right of first entry of TCN family members of EU citizens and the legislation granting TCNs (limited) free movement rights. See Chapter VI.

[102] See also: Cornelisse, G., 'European Integration and Immigration by Third-Country Nationals: The Obduracy of the National Border' (December 2007).

against the recognition of their failure to control migration flows."[103] In the words of Anderson *et al*. "a myth of control over borders is essential to the maintenance of state authority and the credibility of state sovereignty".[104] In the Schengen context this symbolic function of borders has retained its relevance for the participating Member States, who have a common interest in showing their citizens to be "in control" notwithstanding the lifting of checks at the internal borders. Moreover, Member States situated at the external borders now uphold this myth also vis-à-vis the other Schengen Member States.

For the EU itself the idea of common external borders has no less symbolic significance. The Commission in its 2002 Communication puts it as follows: "coherent, effective common management of the external borders of the Member States of the Union will boost security and the citizen's sense of belonging to a shared area and destiny."[105] Mitsilegas has pointed out that the notion of a single territory, implied in the AFSJ objective, is "inextricably bound with the concept of a common border".[106] In Lindahl's view, "the very possibility and concrete realisation of the values of Freedom, Security and Justice, whether separately or jointly, depends on boundaries that determine the territorial unity of a legal community".[107] He underscores that values are the constitutive feature of territoriality.[108] To Lindahl territory means the concrete unity between the normative and physical dimension.[109] At this point however, one may ask how this unity relates to the distinction between the EU-wide objective of an AFSJ and the more restricted Schengen area.

Lindahl argues that "the *spatial unity* of a political community arises when, as the result of a closure, a legal-political order manifests itself to its members as an *inside*."[110] This can be linked with the process of securitisation examined above, which is however concerned with the creation of an *outside*. As Huysmans points out, security policy asserts the "unity and

[103] Boaventura de Sousa Santos, C., *Toward a new legal common sense: law, globalization and emancipation* (London, Butterworths LexisNexis, 2002), 223.
[104] Anderson, M. *et al*., *Policing the European Union* (Oxford, Clarendon Press, 1995), 152.
[105] COM(2002) 233, *supra* note 10, 2.
[106] Mitsilegas, V., 'The implementation of the EU *acquis* on illegal immigration by the candidate countries of Central and Eastern Europe: challenges and contradictions', 28 *JEMS* 4 (2002), 667. See also Lindhal, H., 'Finding a place for freedom, security and justice: the European Union's claim to territorial unity', 29 *ELRev* 4 (2004), 461-484.
[107] Lindhal, H., *ibid*., 474.
[108] *Ibid*., 468.
[109] *Ibid*., 477.
[110] Lindhal, H., '*Jus includendi et excludendi*: Europe and the Borders of Freedom, Security and Justice', 16 *King's College Law Journal* 1 (2005), 239. This seems in line with Arendt's conception of the polity as inward looking: Arendt, H., *The Promise of Politics* (NewYork, Schocken Books, 2005), 170.

autonomy" of the political community by placing it in a hostile environment.[111] In this respect it is significant that the "security continuum" features prominently in the Berlin Declaration, done at the occasion of the fiftieth anniversary of the signature of the EU treaties.[112] In the words of the Commission, the external borders are a place where "a common security identity is asserted." The following passage from the Tampere Milestones shows both importance of territory and borders in the definition of the Union's own values, as well as the definition of the other:

> "This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. (…) It would be in contradiction with *Europe's traditions* to deny such freedom to those whose circumstances lead them justifiably to seek access to *our territory*. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for *a consistent control of external borders* to stop illegal immigration and to *combat those* who organise it and commit related international crimes. (…)."[113]

The EU has by simultaneous definition of its own values and the construction of a dangerous outside created dividing lines of which the external borders are the physical expression.[114]

7. Balancing "Freedom" and "Security"

Before the introduction of the AFSJ objective in the EU treaty, the notion of freedom in the EU treaties referred exclusively to the four freedoms. The free movement of persons was firmly linked to the status of national of a Member State. The Schengen area extended this freedom in a very limited way to TCNs, who in possession of a Schengen visa may move freely in the Schengen area. Security was not, at least not as such, mentioned as a value, neither in the Schengen *acquis*, nor in the EU. Under the Schengen agreements, it was implied in the notion of compensatory measures deemed necessary to curb a perceived security deficit resulting from the full implementation of the freedom of movement of EU citizens.

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[111] Huysmans, J., *supra* note 24, 51 This is more in line with Schmitt's conception of the polity as a response to external threats: Schmitt, C., *The Concept of the Political* (Chicago, The University of Chicago Press, 1996), 29-30.

[112] Declaration on the occasion of the 50th anniversary of the signature of the Treaties of Rome ("The Berlin Declaration"), which states: "We will fight terrorism, organised crime and illegal immigration together."

[113] European Council Conclusions, Tampere, 15-16 October 1999. Emphasis added. There is some irony in the statement that freedom cannot be regarded as the exclusive preserve of the EU citizen, whereas its centre piece, the free movement of persons, is exactly that, see Chapter V.

[114] Mitsilegas, V., *supra* note 106, 668.

The EU, lacking the necessary competences, never presented itself as an (internal) security actor alongside its Member States. A first change took place with the construction of the Third Pillar by the Maastricht Treaty, when the intergovernmental cooperation in JHA in relatively informal and secretive working groups such as TREVI was brought within the EU's constitutional framework.[115] The restructuring of the pillars and the incorporation of the Schengen *acquis*, including the notion of "flanking measures" by the Treaty of Amsterdam gave new impetus to the EU's activities in the provision of internal security, whilst at the same time broadening the notion of freedom beyond the free movement of persons.

The Commission in its Communication on how best to implement the provisions of the Amsterdam Treaty on an AFSJ stated that the freedom included:

> "the freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom. Freedom must also be complemented by the full range of fundamental human rights, including protection from any form of discrimination."[116]

The Tampere Milestones stated that the challenge of Amsterdam was "to ensure that freedom, *which includes the right to move freely throughout the Union*, can be enjoyed in conditions of security and justice accessible to all.[117]

The way in which the Commission Communication was structured, in separate headings titled an Area of Freedom, an Area of Security and an Area of Justice, seems to imply that the Freedom, Security and Justice are connected, yet independent notions.[118] Under the heading "An Area of Security", the Commission repeats that "the full benefits of any area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure."[119] The Treaty of Amsterdam then provides "for the institutional framework to develop common action among the Member States in the indissociable fields of police cooperation and judicial cooperation in criminal matters."[120]

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[115] The Rome European Council of 1975 created the TREVI group, which was a network of national officials from Ministries of Justice and the Interior. It developed a range of working groups that reported to occasional ministerial meetings. One of these working groups, Trevi 92, dealt with the security issues of the free movement of people, including compensatory measures needed for the relaxation of intra-EC border controls.
[116] COM(98) 459 final, Commission Communication, 'Towards an Area of Freedom, Security and Justice', 5.
[117] Tampere Milestones: Tampere European Council Conclusions, 15 and 16 October 1999, point 2.
[118] COM(98) 459 final, *supra* note 116, 1.
[119] *Ibid*, 7. Note the subjective element to this definition of security.
[120] *Ibid*.

One could argue that with the advent of the AFSJ "security" has become a "categorical endogenous value of the Community" as opposed to be implied in the notion of flanking measures to the free movement of persons.[121] It is true that measures for the crossing of the external borders are still presented as flanking measures adopted for the purpose of free movement of persons. This shows for example in the EU budget, where external border and visa policy fall under the same budget heading as free movement of people, as well as in the Hague Programme where border management measures are listed as "Measures for Freedom of Movement."

At the same time however the legal basis for these flanking measures has lent itself for measures that seem to go beyond what is necessary for the achievement of the free movement of persons, serving the rather problematic purpose of security and potentially limiting the wider concept of freedom. A good example here is the Regulation on the inclusion of biometric security features in the passports of EU Member States.[122] Importantly, the Schengen Protocol allows the UK and Ireland to opt-in to parts of the Schengen *acquis*, in practice resulting only in opt-ins to Schengen flanking measures. As Peers has noted, the UK participates in all measures on asylum and most measures on illegal migration.[123] These measures may contribute to the free movement of persons within the Schengen area in general, but in relation to the UK and Ireland they merely allow these Member State to exercise an enhanced control over unwanted migratory flows.

The discussion on the relation between "Security" and "Freedom" in the AFSJ has often been framed in terms of a balancing of the two.[124] In the words of the Commission "[m]aintaining the right balance between [Freedom, Security and Justice] must be the guiding thread tor Union action."[125] This idea of balancing also underlies the argument, often voiced in the post-

[121] Kostakopoulou, T., "The Protective Union: Change and Continuity in Migration Law and Policy in Post-Amsterdam", 38 *JCMS* 3 (2000), 508. A striking illustration here is the comment made by the EU's external border agency's Executive Director, Illka Laitinen, only hours before the lifting of *internal* border checks at the land and sea borders of nine Member States. Rather than sharing in the festive mood surrounding this historic event, he voiced the concern that the EU would "lose a very effective instrument to fight illegal immigration": 'Security fear as EU drops borders' (*BBC News*, 20 December 2007).

[122] Council Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States, *OJ* 2004, L 385/375.

[123] Peers, S., 'British and Irish opt-outs from EU Justice and Home Affairs (JHA) law' (Statewatch Analysis, 2007), 5.

[124] See e.g. Apap, J. and Anderson, M., 'Striking a Balance between Freedom, Security and Justice in an Enlarged European Union' (Brussels, CEPS, 2002), Garcia-Jourdan, S., *L'émergence d'un espace européen de liberté, de securité et de justice* (Brussels, Bruylant, 2005), 39, Balzacq, T. and Carrera, S., 'The Hague Programme: The Long Road to Freedom, Security and Justice', in: Balzacq, T. and Carrera, S., *Security Versus Freedom?: A Challenge for Europe's Future* (Aldershot, Ashgate, 2006), 1-34.

[125] COM(1998) 459 final, *supra* note 116, 1.

9/11 world, that in order to achieve a certain state of security, there is the necessity to impose restrictions on certain fundamental rights and civil liberties,.[126] This however evidences a very narrow conception of security, limited to freedom from physical harm. It also portrays freedom and security as "antithetical values."[127] As such the image of balancing freedom and security has been interpreted as a form of securitisation.[128]

One should rather advocate the position that security measures should always stand at the service of freedom, since security can only be "the result of guaranteeing respect for fundamental freedoms and rights through the rule of law."[129] By such definition striving for a situation of security would constitute a valid objective. The danger however exists that the enforcement measures come to be seen as the sole precondition for such situation or worse as a substitute thereof.

Even if we were to accept the idea that restrictions on freedom may be offset by an increase in security in a more narrow sense, arguments can still be made against such balancing acts.[130] The real effects of measures restricting freedom for the purpose of greater security may be unclear, so that they may only have a mere symbolic effect. While the restrictions may enable the state to ensure security better against for instance terrorist threat, at the same time people may be less protected from abuses of power by the state. Importantly also the restrictions on freedom may actually be felt disproportionately by some people for the benefit of the security of others. This may be in particular the case for migrants and asylum seekers. In the EU, restrictions on entry limit the freedom to travel of TCNs, or more gravely the right to seek asylum, in the name of the security of those within the AFSJ.[131]

It may be argued that in Cases C-77/05 and C-137/05, the ECJ brought back to the fore the free movement rationale of the Schengen cooperation in relation to the UK and Ireland.[132] In these cases the ECJ upheld the UK's exclusion from Regulation (EC) No 2007/2004 establishing Frontex and Regulation (EC) No 2252/2004 on standards for security features

[126] Note in this respect how the introduction to the Hague Programme's refers to the 9/11 and 11/3 attacks in order to support the point made that the security of the EU and its Member States has acquired a new urgency, *supra* note 16.
[127] Guild, E. and Carrera, S, 'The Hague Programme & the EU's agenda on freedom, security and justice: delivering results for Europe's citizens?' (Brussels, CEPS, 18 March 2008).
[128] *Ibid*.
[129] CHALLENGE, 'A Response to the Hague Programme : Protecting the Rule of Law and Fundamental Rights in the Next Five Years of an EU Area of Freedom, Security and Justice?' (December 2004).
[130] See for a full discussion of the arguments summarised below: Waldron, J., 'Security and Liberty: The Image of Balance', 11 *JPP* 2 (2003), 191-210.
[131] See for instance Guild, E., *supra* note 43.
[132] Case C-77/05, *UK v Council*, *supra* note 28, and Case C-137/05, *UK v Council* [2007] ECR I-11593. See also Rijpma, J., 'Annotation to Cases C-77/05 and C-137/05', 45 *CMLRev* 3 (2008), 835-852.

and biometrics in passports issued to citizens of the Union, since they formed a development of those parts of the Schengen *acquis* in which the UK had not opted into previously.[133]

For the UK participation in these measures would not have promoted in any way the free movement of persons, but merely have enhanced its capacities to control the movement of persons. Advocate General Trstenjak in her opinions to the cases argued that any Member State that cooperates to some extent in the Schengen *acquis* should accept both the advantages and the burdens inherent in cooperating in that part of the *acquis*.[134] This reasoning however reverses the logic of the Schengen cooperation in which the free movement of persons is intended to be the advantage, rather than the burden. It forms a good example of how flanking measures have come to be seen as the real advantage of participation in the Schengen *acquis*.

The Court however did not only refer to the need for a prior acceptance of the provisions of the Schengen *acquis*, but also of the principles underlying this *acquis*. It must be assumed that these principles relate to the free movement of persons. This reading is confirmed by the limited scope the judgments leave for the application of the Title IV Protocol. In interpreting the concept of "proposals and initiatives to build upon the Schengen *acquis*" broadly, most measures that find their legal basis in Title IV EC will be covered by the Schengen Protocol, rather than the Title IV Protocol. Under the Title IV Protocol the UK and Ireland would have had an automatic right to opt-in, while Denmark would be excluded from participation.[135] Denmark however does subscribe to the principle of a borderless area for the free movement of persons and participates fully in the Schengen *acquis*, albeit under public international law. The Court's judgments also cast doubt on the Council's past practice of allowing the UK and Ireland to participate under Article 3 of the Title IV Protocol in measures such the ARGO programme for administrative cooperation in the fields of asylum, visas, immigration and external borders and Directive 2001/40/EC on mutual recognition of expulsion decisions.[136]

Although the Court does well in reminding the Member States of the objectives of the Schengen cooperation, one could argue that the participation of the UK and Ireland would

[133] Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L 349/1; Council Regulation (EC) No 2252/2004, *supra* note 122. Case C-77/05, *ibid.*, para. 68 and Case C-137/05, *ibid*, para. 50.
[134] Opinion of AG Trstenjak in Case C-77/05, *UK v Council* [2007] ECR I-11593, para. 113 and Case C-137/05, *UK v Council* [2007] ECR I-11593, para. 110, delivered 10 July 2007.
[135] Denmark's possibility to opt-in is limited to measures building on the Schengen *acquis*: Art. 5, Protocol on the Position of Denmark.
[136] Council Decision 2002/463 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme), *OJ* 2002, L 161/11; Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals, *OJ* 2001, L 149/34.

have benefited from cooperating full. Moreover, having considered above that "security" has become a more self-standing value, the UK participation in the measures could have contributed to the EU's wider objective of establishing an AFSJ. This is particularly true for Regulation (EC) No 2252/2004 which could be applied independent of any other Schengen rules and which could have contributed to more secure travel to, from and (to a more limited extent) within the EU.[137]

8. The External Borders: Walls and Gates to the Neighbourhood

The fear has often been expressed that the implementation of the Schengen *acquis* by the new Member States of Central and Eastern Europe could create new dividing lines in post-communist Europe by restricting cross border economic and cultural links which developed after the fall of the Iron Curtain.[138] In particular the Schengen visa regime and strict controls at the external borders could jeopardize informal cross-border trade, contacts between national minorities, as well as more as more structured forms of cross-border cooperation.[139]

The Commission however considered that efficient border management, besides being vital to fight threats such as terrorism and organised crime, would contribute to good relations between neighbouring states.[140] This latter point finds some support in research showing that the perception of the Polish-Ukrainian border as a barrier to social and economic interaction, is more related to the technical aspect of crossing the border - long queues and inefficiency of the border guards - than with the visa regime.[141]

The EU has been sensitive to the concerns raised regarding possible negative externalities of its Schengen borders regime.[142] It has provided important financial and

[137] Regulation (EC) No 2252/2004, *supra* note 122.
[138] Amato, G. and Batt, J., 'Final Report of the Reflection Group on the Long Term Implications of EU Enlargement: The Nature of the New Border' (Florence, EUI RSCAS, 1999), 9. One has commonly referred to the iron curtain being replaced by a "paper curtain", referring to the visa requirements, or alternatively by a "glass window", clearly showing the disparities between insiders and outsiders: DeBardeleben, J., 'Introduction', in: DeBardeleben (Ed.), *Soft or Hard Borders: Managing the Divide in an Enlarged Europe* (Aldershot, Ashgate, 2005), 3.
[139] See e.g. Wolczuk, K., ''The Polish-Ukrainian Border: On the Receiving End of the EU Enlargement, 3 *PEPS* 2 (2002), 262.
[140] COM(2005) 491 final, *supra* note 118, 4.
[141] Scott, J. and Matzeit, S. (Eds), 'Lines of Exclusion as Arenas of Co-operation: Reconfiguring the External Boundaries of Europe - Policies, Practices, Perceptions' (EXLINEA, Final Project Report, February 2006), 66. See also Kindler, M. and Matejko, E., '"Gateways to Europe": a friendly border?' (Warsaw, Batory Foundation Policy Brief, January 2009).
[142] The Copenhagen European Council Conclusions stated that: "The Union remains determined to avoid new dividing lines in Europe and to promote stability and prosperity within and beyond the new borders of the Union, 12-13 December 2002, point 22.

practical support in the form of pre-accession aid to the candidate countries, its regional development programmes, as well as its programmes funded under the European Regional Development Fund. All of these have included provisions on cross border cooperation going beyond mere reinforcement of checks at the external borders.[143]

In two cases the European legislator has adopted legislation in order to mitigate the possible consequences of the imposition of the Schengen *acquis* in an enlarged EU. First of all it established a specific transit regime, providing for a Facilitated Transit Document (FTD) and a Facilitated Rail Transit Document (FRTD) for residents of Kaliningrad, the Russian enclave surrounded by EU territory since the 2004 enlargement.[144] In late 2006, the Council adopted a Regulation laying down rules on local border traffic at the external borders.[145]

The objective of avoiding new dividing lines in an enlarged EU was also an important impetus for the development of the European Neighbourhood Policy (ENP). This policy aims to develop the countries in the near neighbourhood, creating a "ring of friends" around the EU by allowing these countries to participate in the internal market.[146] However, as we shall see in Chapter X, the freedom of movement for the nationals of the ENP countries is advanced only to a very limited extent, and has rather become a means to control movement of people towards the EU.

9. An Additional Explanation for the Focus on the EU's External Borders

The internal market logic, the securitisation of migration, the symbolic function of borders, the introduction of the AFSJ objective, EU enlargements and the need to prevent the Schengen borders from becoming new dividing lines, all these have contributed to the focus that is placed by European law and policy makers on the management of the EU's external borders. Here it is submitted that there is yet another factor that contributes to the emphasis

[143] This will continue to be the case under the new financial instruments for external action. See Chapter X.
[144] Council Regulation (EC) No 693/2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual, *OJ* 2003, L99/8 and Council Regulation (EC) No 694/2003 on uniform formats for Facilitated Transit Documents (FTD) and Facilitated Rail Transit Documents (FRTD) provided for in Regulation (EC) No 693/2003, *OJ* 2003, L99/15. It was a stated EU objective to adopt this legislation prior to the signing of the 2003 Accession Treaty.
[145] Regulation (EC) No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention, *OJ* 2006, L405/1, see Chapters VIII and X.
[146] COM(2003) 104 final, Commission Communication on the Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, 4.

on the external borders within the AFSJ. This is the continuing importance of the notion of flanking measures, of which measures at the external borders are most prominent as a result of a lack of progress in more substantive areas of JHA.

Anderson *et al*. identified two themes at the core of the debate over the removal of checks at the internal border.[147] The first was that of the compensatory measures which, although it could have long-term consequences, was directly linked to the abolishment of controls at the external borders. The second theme related to the fact that internal borders separate the different criminal and justice systems of the EU Member States. Anderson *et al*. predicted this theme to last into the foreseeable future. The Commission in its 1988 Communication on the abolition of controls of persons at the Intra-Community borders argued that it was an immediate priority to define what actions were indispensible for the abolition of checks at the internal border and which could be a long term objective. It argued that the abolition of internal borders could be achieved on the basis of a "more limited programme", encompassing only the flanking measures, such as controls at the external borders and the short term visa regime, leaving more substantive harmonisation of Member States' legislation in the area of criminal and migration law for a later date.[148]

Although it is difficult to see how the Commission could have proposed anything other than a more limited programme, this approach has proven unfortunate. More than a decade after the lifting of internal boarder controls, the focus of law and policy making in the AFSJ still lies on the adoption of flanking measures. This is mainly because it has proven much more difficult to achieve progress in more substantive areas which would minimise the differences in legal systems of the Member States, but also because the legal bases for these flanking measures have lent themselves for measures that serve the control of movement rather than the freedom thereof.

Both legally and politically, Member States have not been able to establish a truly common European immigration and asylum system. In the field of asylum progress has been limited to the harmonisation of minimum standards and a mechanism for determining responsibility for asylum claims.[149] Member States such as Malta, have made consistent appeals for greater burden-sharing, not merely in financial terms and not merely in the area of

[147] Anderson, M. *et al*., *supra* note 24, 131-132.
[148] COM(1988) 640 final, *supra* note 30, 5.
[149] See Chapter VI. Progress was initially hindered also by the unanimity requirement, now replaced by qualified majority voting: Council Decision 2004/927/EC providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, *OJ* 2004, L396/45.

external border management.[150] Similar suggestions were made by four southern Member States, united in the so-called Quadro Group.[151] Although the European Council has reaffirmed that European solidarity and fair sharing of responsibilities are the guiding principles in *managing the EU's external borders*, little concrete action has been taken.[152]

The Commission in its Policy Plan on Asylum for the first time recognised that some Member States "who find themselves under particular migratory pressures because of their geographical location" face additional burdens under the Dublin Rules.[153] A solution was however sought in the facilitation of "internal re-allocation, on a voluntary basis, of beneficiaries of international protection from one Member State to another in cases of exceptional asylum pressure."[154]

As regards legal migration, Article 63(3)(a) and (4) EC remains subject to unanimity, and the mere consultation of Parliament. Only one Directive has been adopted so far within the framework of the Commission's policy plan on legal migration.[155] The Lisbon Treaty brings about an important change in that it broadens the scope of the articles dealing with migration and asylum, providing for a common immigration and asylum policy rather then minimum standards, to be decided on under the "ordinary legislative procedure", i.e. co-decision.[156] Still, the Lisbon Treaty in a new provision explicitly confirms that the Member States are ultimately responsible for the number of immigrants they allow to enter their

[150] 'True Burden Sharing' (*Times of Malta*, 26 September 2007).
[151] The Quadro Group brings together the ministers of the interior of Cyprus, Greece, Malta and Italy and was established in November 2008 at the initiative of Malta. Spain has expressed interest to join the group. See: 'Quadro Group report stresses solidarity and burden sharing' (*Times of Malta*, 6 March 2009). See the Group's position paper of 13 January 2009: http://www.interno.it/mininterno/export/sites/default/it/assets/files/16/0970_Final_paper_Versione_firmata.pdf
[152] The JHA Council Conclusions of 12-13 June 2007 (Council Document 10267/07), stated: "With regard to the specific difficult situation of Malta, suggestions on a system of sharing of responsibilities will be discussed in Coreper next week with a view to a proper follow-up on this issue." The JHA Council Conclusions of 18 September 2007 (Council Document 12604/07) returned to the issue by concluding with an invitation to: "the Commission to continue its examination of the scope for further measures to address the particular pressures which Member States may be faced with and the suggestions made by Malta to the Justice and Home Affairs Council on 12-13 June 2007 (…)." Very little has however been achieved since and in its Conclusions of 4-5 June 2009, the JHA Council once more agreed to "further examine ways to prevent human tragedies and strengthening the fight against illegal immigration" (Council Document 10551/09).
[153] COM(2008) 360 final, *supra* note 97, 8. Cf. with the approach taken in the Commission's Report on the evaluation of the Dublin system (COM(2007) 299 final), 12, where it was stated that: "Contrary to a widely shared supposition that the majority of transfers are directed towards the Member States located at an external border, it appears that the overall allocation between border and non-border Member States is actually rather balanced."
[154] COM(2008) 360 final, *ibid*., 9. The same solution is proposed by the European Council in its Conclusions of 18-19 June 2009, point 37.
[155] See COM(2005) 669 final, 'Policy Plan on Legal Migration'; Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ("Blue Card Directive"), *OJ* 2009, L155/17, see Chapter V.
[156] Articles 79(1) and (2), TFEU.

territory.[157] The legislation that should facilitate the free movement of TCNs is largely limited to the economically beneficial and rather uncontroversial categories of migrant workers such as scientific researchers, seasonal workers and highly skilled workers.

In the absence of a truly European regulatory system for the management of migration and asylum, the focus of the EU's policy remains on flanking measures, in particular border controls, which are essentially aimed at keeping TCNs out. For the reasons discussed in the previous sections of this chapter this is the type of legislation on which Member States can more readily agree.

Not only within Title IV EC, but also within the Third Pillar of the EU, substantive progress confronting the difference in the criminal and justice systems of the Member States has been slow.[158] Progress in police cooperation has been largely limited to the activities of Europol, CEPOL and the rather obscure Police Chiefs Operational Task Force.[159] Under the Third Pillar, initiatives are generally subject to closer scrutiny by the Member States because of concerns over sovereignty and importantly, subject to a unanimity requirement. The Prüm Treaty can be regarded as the response of a limited number of Member States eager to make progress in this area, resulting in an agreement under public international law rather than within the legal framework of the EU. If however the Prüm Treaty is to be considered as a laboratory for further European integration in this area, so should the measures related to the management of the external borders adopted under Title IV EC.

The Hague Programme stated that "[a]n optimal level of protection of the AFSJ requires multidisciplinary and concerted action both at EU level and at national level between the competent law enforcement authorities, especially police, customs and border guards.[160] Since border management is the only "police power" covered by the First Pillar, the coordination of operational cooperation between national border guard services may serve as a testing ground for future legislation on police cooperation and the building of trust between law enforcement authorities.[161] Since the joint operational activity at the external borders will affect the rights of TCNs far more than those of EU citizens, this may trigger the sovereignty

[157] Article 79(5), TFEU.
[158] De Kerckhove, G., 'Améliorations institutionnelles à apporter au titre VI du traité sur l´Union européenne afin d'accroître l'effecacité et la légitimité de l'action de l'Union européenne dans le domaine de la sécurité intérieure, in: De Kerckhove, G. and Weyembergh, A. (Eds), *Quelles réformes pour l'espace penal européen?*(Brussels, Institut d'Etudes Européennes, 2003), 23.
[159] The Tampere Conclusions, at point 44, called for the establishment of a European Police Chiefs Operational Task Force to exchange, in co-operation with Europol, experience, best practices and information on current trends in cross-border crime and contribute to the planning of operative actions. The Task Force has developed as a sort of *sui generis* body of which the legal status remains unclear.
[160] The Hague Programme, *supra* note 16, Introduction.
[161] See in more detail Chapter IX.

concerns of the Member States and the concerns of EU citizens for their civil liberties to a much lesser extent than other forms of police cooperation.

10. Conclusion

This chapter has aimed to explain not only the rationale behind the EU´s policy on the external borders, but also why the focus of the broader cooperation in the AFSJ remains to a great extent on external border controls. We would argue that each of these rationales has its own explanatory value. Whilst each may independently contribute to the salience of external border management, more often these rationales reinforce each other. Therefore, only when considered together can one come to a better understanding of the importance attached to external border management by European law and policy makers.

The internal market, and the interpretation given to this notion by most Member States as an area without internal border controls, has undoubtedly formed the initial impetus for the development of a common policy on the external borders. The concerns accompanying the enlargement of the EU in 2004 have contributed to a greater degree of burden sharing in both financial, technical and, to a more limited degree, in terms of human resources.

With the fall of the Berlin wall the relative importance of borders for achieving defence purposes decreased. Their police function however became more important in view of the broadening of the concept of security. While borders have always been considered as site of regulatory enforcement of migration laws, the securitisation of migration meant that in this policy area the police function of borders also became pre-dominant.

The framing of migration as a security problem raised the political salience of this policy area. At the EU level, the securitisation of migration has predominantly taken shape in the creation of an " (in)security continuum", bringing security problems such as terrorism, drugs and cross-border crime with migration and asylum within one substantive and institutional framework. Since borders are seen as an important instrument of migration control, the increased importance of migration on the political agenda, has also raised the importance of border controls. Although the actual effectiveness of border controls may be doubted, their symbolic function is of great importance to both the individual Member States and the European Union as a whole.

While border controls were initially represented as flanking measures for the freedom of movement, with the introduction of the AFSJ, they have been given a more self-standing

importance serving the purpose of “security” rather than the broader concept of freedom implied in this Union objective. Although one should realise that there is a fundamental difficulty in portraying freedom and security as independent and opposing values, it could nevertheless be argued that the ECJ in Cases C-77/05 and C-137/05 has shifted the balance between these two back in the direction of freedom, albeit in its more restricted meaning of free movement of persons.

Enlargement has also forced the EU to take into account some of the more negative consequences of the implementation of the border *acquis* to the new Member States and the danger that it could create new dividing lines. The EU has been sensitive to this argument and has, through financial assistance programmes, the development of the ENP and the adoption of specific legislation, aimed at softening some of the consequences of a hard Schengen Border.

An additional explanation that is suggested in this chapter is that the prominent role of external border management in the AFSJ is to some extent by default rather than by choice. Both within Title IV EC and Title VI EU, progress on more substantive harmonisation and cooperation has been slow. The external borders, not in the least by reason of the other rationales examined in this chapter, forms one of the areas within Title IV EC in which policy integration is more achievable. At the same time, the operational cooperation for the purpose of the management of the external borders may serve as a testing ground for areas of cooperation that for now still fall under the Third Pillar, in particular police cooperation. In the following chapter we will link the rationales discussed in this chapter to the way in which the EU has used its competences in the area of external border management, both through legislative and executive action.

VIII. The Schengen External Borders *Acquis*: Legislation and Execution

1. Introduction

After having discussed the transfer of competences for the management of the Schengen external borders and the main rules governing the crossing of these borders by individuals, this chapter will look at the use the EU has made of these competences in order to ensure the correct application and respect for the EU rules on crossing the external borders. It is at this point that we truly start to examine the question of how the EU manages its external borders, also in the light of the different rationales discussed in the previous chapter.

The Reflection Group preparing the 1996 Amsterdam intergovernmental conference argued in response to the lack of transparency and accountability of the Third Pillar under the Maastricht Treaty that "matters relating to the security of citizens require legal protection and, therefore, a legislative framework."[1] As we have seen, the Treaty of Amsterdam brought about the partial communitarisation of competences in the Area of Freedom, Security and Justice (AFSJ), including those in the area of external borders management. Even so, most commentators continue to characterise the AFSJ as a whole as dominated by executive action and operational coordination as opposed to the "legislation-centred constitutional logic of the EU."[2] The aim of this chapter is to see to what extent this remains true in respect of the EU's management of the external borders. To what extent is legislation at the heart of the development of this policy? To what extent does Community action in this field remain distinct from that in other areas covered by the First Pillar?

These questions are important for a number of reasons. The management of the external borders potentially affects the rights of those who (aim to) cross these borders and therefore require legal protection and accountability mechanisms. An understanding of the relationship between legislation and executive action contributes to an understanding of the EU's role in the provision of internal security and in this respect its relationship with the Member States and the institutional balance. Considering that the Lisbon Treaty will merge the First and the Third Pillar, effectively communitarising the whole of the AFSJ, the way in

[1] Report by the Reflection Group: *A Strategy for Europe* ("Westendorp Report", Brussels, 5 December 1995), point 48.
[2] Walker, N., 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey', in: Walker, N. (Ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), 21-22.

which the EU's policy for the management of the external borders is taking shape under the First Pillar may inform the future integration in justice and home affairs (JHA).

This chapter will start with a look at the distinction between legislation and executive action in the EU legal order in general and in the AFSJ in particular. It will proceed by taking stock of the progressive construction of a Schengen external borders *acquis* based on the intergovernmental foundations of the Schengen cooperation. Although the crossing of the external borders is regulated for the most important part in the Schengen Borders Code (SBC) and the Regulation on Local Border Traffic (LBT), these Regulations form part of a broader and rapidly expanding body of legislation, creating the legal framework within which the management of the Schengen external borders takes place.

After the discussion of the legislation governing the management of the external borders, the focus will shift to the EU's executive action. It will be shown that the gradual communitarisation of powers for the management of the external borders is reflected not only in the way in which the Schengen external borders *acquis* is implemented, but also in the way in which operational cooperation is developing. This will lead to a discussion of how the Lisbon Treaty accommodates the executive character of the AFSJ. The chapter will conclude with a critical examination of the legislative measures that were proposed by the Commission in its "Border Package" of February 2007.

2. Defining Executive Action

In order to examine the relationship between legislation and executive action in the EU's policy for the management of the external borders, one must first define what is understood by either of these terms. Contrary to the situation in the Member States' legal orders, in the Community legal order the separation between acts of a legislative nature and executive action is not easy to draw. For both recourse is had to the instruments of Article 249 EC, so that the choice of instrument (decision, directive, regulation) does not say anything as to the nature of its content.[3] One may nevertheless define legislation in form by reference to its adoption under a legislative procedure.[4]

[3] Lenaerts, K. and Desomer, M., 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', 11 *ELJ* 6 (2005), 746.

[4] Legislation in form as opposed to legislation in substance, which is based on the notion of the general applicability of acts: Türk, A., *The concept of legislation in European Community Law* (Alphen aan de Rijn, Kluwer Law International, 2006), 238-239.

Walker in his discussion of the legislative/executive nature of the AFSJ places legislation in opposition to executive and operational action, without distinguishing the latter two.[5] He argues that both refer to the "post-legislative (or in some cases non-legislation-based) phase of policy application and implementation." On the one hand executive is used to refer to "high" governmental activity and operation to "low" bureaucratic or policy professional activity.[6] In the discussion on the executive nature of the AFJS one tends to underline the "on the ground" or "practical" nature of EU activity. In that context however, the reference to "executive" often carries with it the notion of law enforcement authorities' powers of coercion.[7]

Here it is argued that whilst legislation needs to be distinguished from execution, a further distinction needs to be made between two different types of executive action. On the one hand there is the implementation of legislation through executive decision making. This is the type of executive action Crum referred to when he considered the policy area of the Third Pillar as one of the "crucial test cases" for future legislative-executive relations in the EU.[8] On the other hand there is the executive action which consists of scientific, technical and operational cooperation at the EU level. This is the type of executive action referred to by the Convention's working group on Freedom, Security and Justice when it advocated a separation between "legislative" and "operational" tasks.[9]

Implementation of legislation

Not unlike domestic Member State legislation, Community legislation often requires implementation. The prime responsibility for implementation lies with the Member States, even if this is nowhere stated explicitly in the current Treaties.[10] Where however uniform conditions for implementation have been a requisite, implementation at the central, Community level has become almost as important.

The third indent of Article 202 EC states that the Council can confer on the Commission, in the acts which it adopts, powers for implementation of the rules which the

[5] Walker, N., *supra* note 2, 21-22.
[6] *Ibid*.
[7] *Ibid*.
[8] Crum, B., 'Legislative-Executive Relations in the EU', 41 *JCMS* 3 (2003), 377.
[9] Final Report of Working Group X on Freedom, Security and Justice, European Convention, CONV 426/02, 3.
[10] This can also be inferred from Article 5 EC (principle of subsidiarity) and Article 10 EC (principle of sincere cooperation). The Lisbon Treaty states it explicitly in Article 291(a) TFEU.

Council lays down.[11] Article 211 EC, fourth indent, lists as one of the Commission's tasks the exercise of the powers conferred on it by the Council for the implementation of the rules laid down by the latter. The Court has interpreted the concept of implementation broadly. It encompasses the power to supplement and amend non-essential elements of legislative acts.[12] Moreover, it covers "both the drawing up of implementing rules and the application of rules to specific cases by means of acts of individual application."[13]

Comitology

The third indent of Article 202 EC, states that the Council may, in "specific cases" reserve implementing powers to itself. Moreover, it may impose certain requirements in respect of the exercise of implementing powers. This proviso, inserted by the Single European Act, confirmed a practice that had developed in the early 1960s under which the Commission exercises the implementation powers under the supervision of a committee consisting of Member State representatives.[14] The Court had already in 1970 given its approval of the so-called comitology system, arguing that since the Council could delegate implementing powers to the Commission, it was also allowed to determine "any detailed rules to which the Commission is subject in exercising the power conferred on it."[15] Although there is agreement that comitology functions as a control mechanism in the inter-institutional relations, there is disagreement over the workings in practice. Although comitology continues to play an important role in inter-institutional battles for influence, some observers have described its day-to-day reality as one of consensual deliberations between national experts, rather than "mini-council meetings."[16]

There are four types of committees distinguished by the procedure they follow: advisory, management, regulatory and regulatory with scrutiny. In the case of an Advisory Committee, the Commission is only required to take the opinion of the committee into consideration.[17] In case of a differing opinion of a Management Committee, the Commission

[11] The reference to the Council must now be interpreted as a reference to the Community legislator.
[12] Case 25/70, *Köster* [1970] ECR 1161, para. 6; Case C-240/90, *Germany* v *Commission* [1992] ECR I-5383, para. 36.
[13] Case 16/88, *Commission v. Council* [1989] ECR 3457, para 11.
[14] Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, *OJ* 1999, L184/23, as amended by Council Decision 2006/512/EC, *OJ* 2006, L200/11.
[15] Case 25/70, *supra* note 12.
[16] Blom-Hansen, J., 'The EU Comitology System: Who Guards the Guardian?' (Paper presented at the APSA Annual Meeting, Boston, 28 August 2008), 1.
[17] Article 3, Council Decision 1999/468, *supra* note 14.

can adopt the implementing measure, but must inform the Council, which can then take a different decision by qualified majority.[18] In case of a differing opinion by a Regulatory Committee, the Commission cannot adopt the measure, but must refer it to the Council and inform the European Parliament. The Council can adopt the proposal by qualified majority or reject it. If the Council neither adopts the proposal, nor rejects it, it is adopted by the Commission.[19]

The Regulatory Committee with scrutiny is the most heavy procedure, introduced in 2006 to give the European Parliament, as co-legislator, a role in the comitology procedure.[20] This procedure applies where the Commission proposes to supplement or amend certain non-essential elements of legislative acts. It allows the European Parliament and the Council to oppose a proposed implementing measure by simple and qualified majority, respectively, even if the Committee's opinion is in accordance with the Commission's proposal.

Implementation under the Third Pillar

It should be recalled that competences in border management were transferred from the First to the Third Pillar by the Treaty of Amsterdam and that there remains a close link between these competences and the subject areas covered by the Third Pillar.[21] It is therefore informative to have a brief look at the exercise of powers within the Third Pillar.

Even more than in the First Pillar, implementation in the Third Pillar is dependent upon the Member States' administrations.[22] The Council may however adopt implementing measures itself on the basis of Article 34(2)(c) and (d) EU. It must decide with a two-thirds majority when adopting measures implementing Conventions and with qualified majority when adopting measures implementing Decisions. In addition two-thirds of the Member States must be in favour and a Member State may ask for a verification of whether the qualified majority represents at least 62% of the Union's total population. If this is not the case the decision will not be adopted.[23] Owing to the absence of a system comparable to that

[18] Article 4, *ibid*.
[19] Article 5, *ibid*.
[20] Article 5a, *ibid*.
[21] See Chapter III.
[22] Den Boer, M. and Wallace, W., 'Justice and Home Affairs: Integration through Incrementalism?', in: Wallace, H. and Wallace, W. (Eds), *Policy Making in the European Union* (Oxford, OUP, 2000), 511.
[23] Article 34(3) EU.

of comitology under the First Pillar, the execution of measures is often the responsibility of Council bodies and is managed at Working Party level.[24]

Delegating powers to agencies

With regards to the possibility of delegation of powers to other Community bodies other than the Community institutions, the Court in the 1950s laid down an anti-delegation doctrine.[40] This doctrine is based on the idea that the delegation of discretionary power involving a margin of political judgment would upset the balance of powers assigned to the institutions. According to the Court, delegation must be limited to implementing powers clearly defined and entirely supervised by the delegating institution on the basis of specific and objective criteria.[25]

Under the *Meroni* doctrine the delegation of powers to other Community bodies is limited to tasks involving technical or scientific assistance.[26] Such bodies can only be granted decision-making power in narrowly defined technical areas.[27] This has not prevented the Commission from setting up a considerable number of agencies since the mid-1970s.[28] These agencies assist the Commission in the preparation and execution of EC regulatory policies.

[24] Council document 15515/01, 5.

[25] Case 9/56, *Meroni* [1957] ECR 11 at 147-149 and Case 10/56, *Meroni* [1958] ECR 53 at 169-171. Although the Meroni cases were related to the European Coal and Steal Community (ECSC), their applicability has been generally accepted and confirmed by the ECJ in Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, [2005] ECR I-6451, para. 90.

[26] See *inter al.* Vos, E., 'Reforming the European Commission: What Role to play for European Agencies', 37 *CMLRev* 6 (2000), 1122-1123, Yataganas, X.A., 'Delegation of Regulatory Authority in the European Union - The Relevance of the 46. American Model of Independent Agencies' (Jean Monnet Working Paper 03/01, New York, 2001), 30 and Geradin, D. and Petit, N., 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' (Jean Monnet Working Paper 01/04, New York, 2004), 15.

[27] See also: Article 54 of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the General Budget of the European Communities, *OJ* 2002, L248/1: "The Commission may not delegate to third parties the executive powers it enjoys under the Treaties where they involve a large measure of discretion implying political choices. The implementing tasks delegated must be clearly defined and fully supervised as to the use made of them." Currently four agencies have decision making powers: the Community Plant Variety Office (CVPO), the Office for the Harmonisation of the Internal Market (OHIM), European Aviation Safety Agency and the European Chemicals Agency (ECHA). They decide on either trademarks or on licences in their respective field of competence.

[28] Dehousse notes that by the end of 2007 there were 28 agencies, with a cumulative budget of over 1 billion euro. Over a third of the posts created under the Commission since 1992 were assigned to regulatory agencies. Dehousse, R., 'Delegation of powers in the European union: The need for a multi-principals model', 31 *WEP* 4 (2008), 789-790. The Commission has however announced a thorough evaluation of all agencies by 2009-2010 and will not propose any new regulatory agencies in the meantime: COM(2008) 135 final, Commission Communication, 'European Agencies - The Way forward,' 9.

There is no definition of the concept of an agency in EC legislation.[29] Agencies are generally characterised as bodies set up by an act of secondary legislation, having legal personality, governed by European public law and distinct from the Community Institutions.[30] The Commission initially distinguished between two types of agencies: regulatory agencies and executive agencies. Executive agencies are set up by a Commission decision and are responsible for purely managerial tasks, *i.e.* to assist the Commission in implementing the Community's financial support programmes.[31] Regulatory agencies are those agencies that are "required to be actively involved in exercising the executive function by enacting instruments that contribute to regulating a specific sector."[32]

Regulatory agencies lack a legal basis in the EC Treaty. In the past they have been set up in an *ad hoc* manner on the basis of Article 308 EC. Current practice has established agencies on the basis of the Treaty provision that constitutes the specific legal basis relevant for the policy in question.[33] Within regulatory agencies, the Commission previously made a distinction between executive agencies and decision-making agencies. This distinction was however confusing and should be read as regulatory agencies with and regulatory agencies without decision-making powers.[34]

In its most recent Communication on European Agencies a more elaborate classification was proposed, distinguishing between agencies with decision-making powers, agencies providing direct technical or scientific assistance to the Commission, agencies responsible for information gathering, analyzing and disseminating information and agencies in charge of operational activities.[35] Presumably in view of the Lisbon Treaty's merging of the First and Third Pillar, the Commission for the first time included also the agencies set up by the Council under the EU's police and justice cooperation in criminal matters.[36]

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[29] Report by the Working Group 'establishing a framework for decision-making regulatory agencies' (group 3a) in preparation of the White Paper on European Governance, Work Area 3, Improving the exercise of executive responsibilities (June 2001), 6.
[30] www.europa.eu.int/agencies.
[31] Council Regulation (EC) No 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, *OJ* 2003, L11/1.
[32] COM(2002) 718 final, Commission Communication on the operating framework for the European regulatory agencies, 4.
[33] The Court has confirmed the legality of this practice in Case C-217/04, *ENISA* [2006] ECR I-3771, paras 42-45.
[34] As noted also by D. Geradin and Petit, N., *supra* note 26, 47.
[35] COM(2008) 135 final, *supra* note 28, 7. Cf. Craig, P., *EU Administrative Law* (Oxford, OUP, 2006), 154 ff.
[36] Currently, there are three of these so-called Third Pillar Agencies: Europol, Eurojust and European Police College (CEPOL).

As early as 2002, the Commission made an attempt to rationalise the establishment of regulatory agencies.[37] A draft inter-institutional agreement was however halted in the Council.[38] A 2008 Communication by the Commission announced the withdrawal of the proposal, launching an "inter-institutional discussion" instead.[39] Still, the structure of the agencies that have been set up since 2002 have largely followed the Commission's proposal, with the exception of the size and composition of the Agencies' governing bodies.[40] Most interesting and probably a sign of a more careful approach towards the setting up of agencies, is the Commission's announcement that awaiting the results of an evaluation of existing agencies, it will refrain from proposing the establishment of new agencies.[41]

The legal effect of "executive action"

Instead of focussing here on the - contestable - distinction between political and a-political tasks which could or could not be delegated to regulatory agencies in the light of the *Meroni* doctrine, we would like to emphasise the distinction between executive action which has effects in law, i.e. which creates enforceable rights and obligations for third parties, and executive action which does not. Implementation of legislation by the Commission, the Council or regulatory agencies with decision-making power, would fall under the former. Technical and scientific assistance, as well as operational coordination, be it by the Commission, the Council or a regulatory agency, would be covered by the latter.

As Hoffman has argued the extent of the European administrative space can only be appreciated by looking beyond administration's implementation activity.[42] By defining the nature of EU executive action more precisely, the distinction proposed between executive action which has legal effect and that which does not allows us to do just that. Considering that the EU functions as a system of multi-level or network governance, also in the AFSJ, a

[37] COM(2002) 718 final, *supra* note 32.
[38] COM(2005) 59 final, Draft interinstitutional agreement on the operating framework for the European regulatory agencies, 3; see also SEC (2004) 1153, Commission Report on European Governance (2003-2004), 8.
[39] COM(2008) 135 final, *supra* note 28, 6.
[40] The Commission had argued in favour of a more limited size of the agencies' governing boards, meaning that not all Member States would be represented: COM(2002) 718 final, *supra* note 37, 9. The only exception is the European Food Safety Agency (EFSA).
[41] Note that agencies already under inter-institutional discussion, as well as planned agencies in the AFSJ and changes in the scope of existing agencies would continue: COM(2008) 135 final, *supra* note 28, 9. This would include the establishment for an agency for the management of large-scale IT-databases in the AFSJ (COM(2009) 293 final) and a European Asylum Support Office (COM(2009) 66 final). Presumably it would also cover the proposals for the future development of the European Border Agency Frontex (COM(2008) 68 final).
[42] Hoffman, H., 'Mapping the European administrative space', 31 *WEP* 4 (2008), 665

distinction based on the legal effect of EU administrative activity is preferred over a distinction based on the level at which this executive action takes place.[43]

It will be shown that while there are clear rules in place regarding the implementation of legislation through legally binding acts, this is much less the case in terms of the more "factual" or "physical" EU activity, which lacks the intention to have effects in law. This could prove problematic in relation to operational coordination in the AFSJ, where the cooperation between Member States may involve the exercise of coercive powers.

We will first examine the use that the Community legislator has made of the various legal bases provided for in the Treaties, which have allowed it to adopt measures for the management of the external borders. We will observe in detail the various pieces of legislation adopted, including the provisions made for their implementation.

3. The Building of a Schengen External Borders *Acquis*

In the first years following the entry into force of the Treaty of Amsterdam, there was relatively little legislative activity in the field of external borders management. Regulations concerning local border traffic and common standards for the surveillance of land and sea borders envisaged in the 1999 "Schengen Regulations Action Plan" of the Council's Frontiers Working Party were not adopted until 2006.[44] Of course, a considerable *acquis* was already in place in the form of those parts of the Schengen *acquis* that were incorporated in the EU legal order by the Treaty of Amsterdam and that were assigned to the new legal bases provided for by that Treaty.[45]

The impending enlargement, reinforced by the sharp increase in sub-Saharan migration across the Mediterranean from 2000 onwards and the events of 9/11 brought borders back on the EU's agenda.[46] In December 2001 the JHA Council agreed to: 1)

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[43] Kohler-Koch, B. and Rittberger, B, 'Review Article: The "Governance Turn" in EU Studies,' in: Sedelmeier, U. and Young, A., *JCMS Annual Review of the European Union in 2005* (Oxford, Blackwell, 2006), 27-49. See also: Eder, K. and Trenz, H.-J., 'The Making of a European Public Space: The Case of Justice and Home Affairs,' in Kohler-Koch, B. (Ed.), *Linking EU and National Governance* (Oxford, Oxford University Press, 2003), 111-134.

[44] Council Document 12479/99.

[45] Council Decision 1999/435/EC concerning the definition of the Schengen *acquis*, *OJ* 1999, L176/1 and Council Decision 1999/436/EC determining the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, *OJ* 1999, L176/17.

[46] Monar, J., 'Justice and Home Affairs', in: Miles, L. (Ed.), *JCMS The European Union: Annual Review 2002/2003* (Oxford, Blackwell, 2003), 124. See also De Haas, H., '*The Myth of Invasion: Irregular migration from West Africa to the Maghreb and the European Union*' (Oxford, IMI Research Report, October 2007), 15, who links this increase to a major anti-immigrant backlash in Libya in 2000.

strengthen and standardise European border controls 2) assist candidate States in organising controls at Europe's future external borders, by instituting operational cooperation 3) facilitate crisis management with regard to border control and 4) prevent illegal immigration and other forms of cross-border crime.[47] Subsequently, the Laeken European Council Conclusions of 14 and 15 December 2001 asked the Council and the Commission to:

> *"(…) work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created (...)."*[48]

In response, the Commission came forward with its 2002 Communication on the integrated management of the external borders. In this Communication for the first time reference is made to the establishment of a "common corpus of legislation" in relation to the management of the common Schengen borders.[49] In the short term, the most important measures envisaged remained the recasting of the Schengen *acquis* in a Schengen Borders Code and the long overdue adoption of measures on local border traffic (LBT).[50]

For the medium term, the Commission was more ambitious. It envisaged a formalised process of exchanging and processing data and information between authorities operating at the external borders and those operating within the common area of freedom of movement. This system, called PROSECUR, would "aim to establish direct links and exchanges between the authorities concerned with security at external borders."[51] In the long term this process would have to be formalised in a legal instrument which would lay down not only the rights and obligations of border guards, but also of other police and judicial authorities. Although the Commission considered that such an instrument could be based on either Article 62(1) or 62(2)(a) EC, this may be doubted in so far as the consultation and exchange would have the purpose of general crime prevention and would regulate the rights and obligations of general law enforcement authorities in this regard.[52]

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[47] Results of the JHA Council, 6-7 December 2001 (Council Document 14581/01), 13.
[48] European Council Conclusions, Laeken, 14 and 15 December 2001, point 42.
[49] COM(2002) 233 final, Commission Communication, 'Towards Integrated Management of the External Borders of the Member States of the European Union', 12.
[50] Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006, L105/1 (hereinafter: 'SBC') and Regulation (EC) No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States, *OJ* 2006, L405/1 (hereinafter: 'LBT Regulation').
[51] COM(2002) 233 final, *supra* note 49, 15.
[52] See the discussion below on the exchange of Personal Name Record (PNR) data and the harmonisation of criminal law under the First Pillar.

The Communication further stated, by having recourse to Article 66 EC, that the Community budget should contribute to the financing of a common policy. A financial burden sharing system should be established as a run-up to the creation of a complementary operational burden sharing mechanism. The operational mechanism was to take the shape of a European Corps of Border Guards; a body endowed with a "genuine operational inspection function", which it could exercise either at the request of a Member State or of its own initiative.[53] The Council's Action Plan for the Management of the External Borders of the Member States largely took over the Commission's proposals, but was understandably much more careful as regards the setting up of a European Corps of Border Guards.[54] It generally put much less emphasis on the eventual need for common legislation and financing, focussing instead on measures of an operational rather than legal nature, giving the plan a very "pragmatic" orientation.[55]

Nevertheless, a wide range of legislative instruments has been adopted which determines, either directly or indirectly, the way in which the Schengen external borders are managed. These measures do not necessarily relate exclusively to the act of crossing an external border, nor do they fully coincide with those envisaged in the Commission Communication or the Council's Action Plan. This is first of all because the Court has construed the notion of "Schengen developing measures" broadly, to the effect that all measures that judged by their content and purpose render more effective parts of the Schengen *acquis* qualify as such.[56] As a result, measures developing the Schengen *acquis* on the external borders adopted on the basis of Articles 62(2)(a) EC and Article 66 EC cover a broad range of legislative initiatives from the establishment of the EU's border agency Frontex to common requirements regarding EU passports. Moreover, a considerable number of measures that find their legal basis in other areas of EU competence under Title IV EC (such as irregular migration, visa or asylum) or under the Third Pillar, include provisions which affect the way in which the Schengen external borders are managed. As such, the rules that make up the "Schengen external borders *acquis*" are to be found across a broad range of measures, which can be roughly divided into five categories.[57] These are the Schengen

[53] COM(2002) 233 final, *supra* note 49, 13.
[54] Council Document 10019/02, point 120. The plan was officially endorsed in the European Council Conclusions, Seville, 21-22 June 2002, point 27.
[55] Monar, J., 'The Project of a European Border Guard', in: Caparini, M. and Marenin, O., *Borders and Security Governance: Managing Borders in a Globalised World* (Münster, LIT Verlag, 2006), 200.
[56] Case C-77/05, *UK v Council* [2007] ECR I-1145, para. 85 and Case C-137/05, *UK v Council* [2007] ECR I-11593, para. 56, see Chapter IV.
[57] This categorisation will include agreements concluded with third countries, although the relationship between the management of the external borders and third countries will be discussed in more detail in Chapter XI. This

borders *acquis* in a narrow sense, measures for financial burden sharing, measures for surveillance by technological means, measures penalising irregular entry, human smuggling and trafficking, and measures for the coordination of operational cooperation.

3.1 The Schengen Borders *Acquis* in a Narrow Sense

One may first identify a Schengen borders *acquis* in a narrow sense: the core measures that establish the legal regime for controls at the Schengen external borders. Most important is of course the SBC. Its adoption on the basis of Articles 62(1) and (2)(a) EC can be seen as the logical consequence of the incorporation of the Schengen *acquis* into the EU legal order, which necessitated the recasting of the previously existing Schengen rules as legislative instruments. In the case of the LBT Regulation, the second most important measure in this category, effect was given to an obligation flowing from the original Schengen Implementing Convention (CISA).[58]

Both Regulations establish the legal regime governing the crossing of the external borders by individuals as was discussed in Chapter VI. However, the SBC is more than that, it constitutes a more comprehensive legal framework for the management of the external borders, containing provisions on surveillance, cooperation between border guard authorities, the reinstatement of internal border controls and practical rules as regards for instance the infrastructure of border crossing points or forms to use.

The fact that the ultimate responsibility for the management of their respective part of the Schengen external borders continues to lie with the Member States makes that the rules on surveillance are of a very general character.[59] Article 12 of the SBC sets out the purpose of border surveillance, as being "to prevent irregular border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally." Member States shall survey the border deploying mobile and stationary units, and possibly technical means.[60] They shall deploy sufficient financial and human resources and ensure that

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categorisation is limited to measures which find their legal basis in the AFSJ, although of course there may be links between the management of the external borders and measures adopted under other parts of the Treaties, such as the internal market (art. 95 EC), development policy (art. 179 EC) or transport (Art. 80 EC). An example of an instrument adopted on the basis of Article 80 EC is Regulation (EC) No 300/2008 on common rules in the field of civil aviation, *OJ* 2008, L97/72.

[58] Article 3 CISA.

[59] Article 12(5) read in conjunction with Article 33(2) SBC does state that the provisions on surveillance may be supplemented by rules adopted under comitology (regulatory procedure).

[60] Article 12(2) and (4), SBC.

their border guards are specialised, trained professionals.[61] Also as regards the provisions on cooperation between border guard authorities, the SBC provides more for a general framework of Member State action, whilst referring in Article 16(2) to the secondary legislation regulating the coordination of operational cooperation by the European Border Agency, Frontex.[62]

3.2 Financial Burden Sharing

A second category of legislative measures consists of measures that aim at achieving a degree of financial burden-sharing. In the previous chapter the need to share the burden for the management of the external borders between the Member States, in both financial and operational terms, was identified as one of the rationales behind the EU's involvement in border management. The Commission Communication on the integrated management of the external borders identified burden-sharing as a core component of a common policy.[63] However, where in 2002 the Commission still very much presented financial burden-sharing as a "run-up" to operational burden-sharing, it has now taken on a more independent importance with the creation of the External Borders Fund (EBF).[64]

Odysseus Programme

A first instrument setting up a system that would contribute to the funding of cooperation *between* national administrations was adopted under the Maastricht Treaty. A Joint Action established the Sherlock Programme, providing for funding for training, exchange and cooperation in the field of the security of identity documents.[65] This programme was then subsumed into the broader Odysseus Programme, funding cooperation in the area of border control, as well as immigration and asylum.[66] Article 9 of the Odysseus Joint Action

[61] Articles 12(3), 14 and 15(1), third paragraph, SBC.
[62] See on Frontex, below and Chapter IX.
[63] COM(2002) 233 final, *supra* note 49.
[64] Decision No 574/2007/EC establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', *OJ* 2007, L144/22 (hereinafter: 'EBF'). COM(2002) 233 final, *ibid*., does speak of supplementing the financial burden-sharing mechanism, rather than substituting it.
[65] Joint Action 96/637/JHA introducing a programme of training, exchanges and cooperation in the field of identity documents (Sherlock), *OJ* 1996, L287/7.
[66] Joint Action 98/244/JHA introducing a programme of training, exchanges and cooperation in the field of asylum, immigration and crossing of external borders (Odysseus-programme), *OJ* 1998, L99/2.

specifically referred to projects concerning "organising the practicalities of controls, including matters concerning the security of identity documents." In this respect problems on a thematic or geographical basis were to be given special attention. Article 11 stipulated that in order to qualify for financing, projects were required to have a "demonstrable interest to the Union" and involve a minimum of two Member States.[67]

ARGO Programme

The Odysseus Programme expired in 2002. In the meantime the Treaty of Amsterdam had come into force. The 2002 Commission Communication, while introducing the need for financial burden sharing, was very clear that this "should not have as an objective the integral financing of all checks and surveillance at the external borders through the community budget," but should rather take the form of a financial redistribution mechanism.[68] Community schemes should however avoid financial contributions set by bilateral agreements between Member States which would quickly become "complex and inequitable."[69]

A First Pillar Council Decision replaced the Odysseus Programme with the establishment of the Community funding programme called ARGO.[70] It was adopted on the basis of Article 66 EC, shortly after the publication of the 2002 Commission Communication. It is interesting to note that there is no explicit mention of the term burden sharing or solidarity in the ARGO decision. Nevertheless, in line with the Communication, the programme was to be considered "a modest forerunner of more extensive activities in this field."[71] The programme would also cover projects involving acceding Member States, in view of the impeding enlargement, as well as other Third Countries.[72] The decision specifically allowed agencies of Member States that did not participate in the Decision (*i.e.* Ireland and Denmark) to be associated with projects funded under the ARGO programme.[73]

A mid-term evaluation of the implementation of the ARGO programme showed that between 2002 and 2004 the focus on external borders increased enormously. The use of the

[67] Under the Sherlock Programme there was a required minimum of three Member States, Article 7, Joint Action 96/637/JHA, *supra* note 65.
[68] COM(2002) 233 final, *supra* note 49, 20.
[69] *Ibid*.
[70] Council Decision 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme), *OJ* 2002, 161/11.
[71] Recital 3, *ibid*.
[72] Article 10(1)(a), *ibid*.
[73] Article 10(2), *ibid*.

budget in this category nearly quadrupled from 2003 to 2004.[74] Initially there was only limited use made of the available funds. Both the mid-term evaluation and the Commission's first annual report on the implementation of ARGO pointed at the unfamiliarity of national administrations with the existence of the Programme and the Community financial rules on grants, as well as a lack of experience in cooperating with partner institutions in other Member States.[75]

In December 2004, the Council amended the ARGO decision, increasing the number of actions in the area of external borders "to promote the general objectives of the ARGO Programme."[76] For the first time explicit reference was made to "a wider definition of solidarity that would include, *inter alia*, Community support in the management of external borders."[77] What exactly justified the priority given to projects in the area of the external borders over visas, asylum, migration remains however unclear. While the original ARGO decision still stated that individual action by each administration was incapable of achieving uniformity between the practices of the Member States, the amending decision aimed to facilitate access to the programme by making funding available also for projects in a single Member State.[78] Such action would need to promote one of the general objectives of the programme and contribute to integrated border management "by addressing specific structural weaknesses at strategic border points, identified on the basis of objective criteria."[79]

External Borders Fund

In spring 2005, the Commission proposed three new framework programmes for the AFSJ for the period 2007-2013: Security and safeguarding Liberties, Fundamental Rights and Justice and the Solidarity and Management of Migration Flows. The latter was to give effect to the Hague Programme's call for "solidarity and fair sharing of responsibility including its financial implications between the Member States".[80] It encompassed the creation of four

[74] 'Mid-term evaluation of the ARGO Programme' (Antwerp, Yellow Window Management Consultants, 20 July 2006), 6.
[75] Mid-term Evaluation, *ibid*, 37 and SEC(2004) 211, Commission Staff Working Paper, First annual report on the implementation of the ARGO programme (2002-2003), 6. This puts the Commission's assertion that bilateral agreements would soon become too complex in perspective, *supra* note 49.
[76] Recital 5, Council Decision 2004/867/EC, amending Decision 2002/463/EC adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme), *OJ* 2004, L/371/48.
[77] Recital 3, *ibid*.
[78] Recital 6, Council Decision 2002/463/EC, *supra* note 59.
[79] Article 1, Council Decision 2004/867/EC, *supra* note 76.
[80] The Hague Programme, Annex to the European Council Conclusions, Brussels, 4-5 November 2004, point 1.2.

separate funds: a European Refugee Fund, a European Fund for Integration, a European Return Fund and an External Borders Fund (EBF).[81] Not only was the Solidarity Framework Programme the most important of the three framework programmes, but within this programme the EBF was allocated a lion's share of the reserved budget. It entailed in any case a considerable and more structural increase in the Community funding for this purpose.[82]

In May 2007, the decision establishing the EBF was adopted against the background of the continuing attempts of irregular migrants to reach Europe by boat.[83] By December 2006, the European Parliament had already created a preparatory action (budget line 18 03 12) for the implementation of actions in 2007 with the aim of assisting the concerned Member States.

Article 3 of the decision lists a number of general objectives, which are elaborated in specific objectives in the following article. The general objectives are not limited to the improvement of border controls at the external borders or the uniform application of the Schengen rules, but also aim "beyond the border" with the improvement of the activities of consular and other services of the Member States in third countries, for instance in the area of visas or pre-border controls.

The Fund may contribute to the financing of technical assistance either at the initiative of a Member State or the Commission. The most important part of resources is allocated to the Member States (shared management).[84] Funding of national actions may not exceed 50 percent of the total cost of the action, or in case of projects addressing specific objectives identified in the Strategic Guidelines, 75 percent.[85]

Eligible actions are proposed by the Member States in annual programmes, which in turn are based on strategic multiannual programmes. The multiannual programmes are drawn up by the Member States in consultation with the Commission on the basis of the Commission's Strategic Guidelines, which define the priorities for the implementation of the

[81] COM(2005) 123 final, Commission Communication establishing a framework programme on Solidarity and the management of Migration Flows for the period 2007-2013.
[82] Cf. the Argo Programme's budget of 25 million euro for the period 2002-2006, with that of the External Borders Fund (1820 million euro for the period 2007-2013), bearing in mind also the more limited scope of the EBF.
[83] Decision No 574/2007/EC establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', *OJ* 2007, L144/22. Although the actual numbers of landings in Italy and the Canary Islands had been decreasing in comparison to previous years, the media attention and political tension was mounting in par with the number of casualties reported. The very same day of the adoption of the EBF Decision a boat carrying 57 people disappeared (*La Reppublica*, 24 May 2007). A day later images of immigrants clinging onto tuna baskets made headlines (*La Reppublica*, 26 May 2007). See also: 'Even in death, migrants were let down by Europe' (*The Independent*, 4 June 2007).
[84] Article 5, EBF.
[85] Article 16(4), EBF.

EBF. The Strategic Guidelines are adopted under the regulatory comitology procedure with scrutiny.[86] Both the Multiannual and Annual Programmes, as well as the annual list of selected actions, are adopted by the Commission under the management comitology procedure.[87]

The distribution of the annual resources available between the Member States is done on the basis of Article 14. The total amount available is divided between land borders (30%), sea borders (35%), air borders (20%) and consular offices (15%). These sums are then further broken down between the Member States. For land and sea borders this is done on the basis of their length (70%), calculated, on the basis of weighing factors for each specific section, and workload (30%). The weighing factor is determined on the basis of a risk analysis by Frontex, the External Borders Agency, determining the threat level for irregular migration.[88] For air borders the workload alone is the determinant and for consular the number of offices and the workload (50-50).

Under Article 7, the Commission can use up to 6% of available resources for transnational actions or actions of interest to the Community as a whole (direct management). These actions must concern one of the following objectives: enhancement of the activities of Member States' consular and other services in third countries, the progressive inclusion of customs, veterinary and phyto-sanitary controls in integrated border management activities and the provision of support in duly substantiated emergency situation requiring urgent action at the external borders.[89] It is not entirely clear from the decision what would constitute such a situation, but in line with reference to emergency situations in the EC Treaty and secondary legislation, it can be assumed that this entails a sudden and massive influx of third country nationals.[90] An annual work plan, adopted under the management comitology procedure, lays down the priorities for such Community action. Moreover, each year, the Commission, under article 19, establishes a list of specific actions to be implemented by the Member States which contribute to the development of the European common-integrated-border management system by addressing weaknesses at strategic border points.

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[86] Article 56(1), EBF, establishes the 'Solidarity and Management of Migration Flows' Committee.

[87] Article 9 and Chapter IV, EBF. Also the adoption of annual work plans under the Odysseus (note: Third Pillar) and the ARGO Programme was subject to scrutiny by a committee consisting of Member States representatives.

[88] Article 15, EBF. Note here the use of the value-laden word "threat," portraying irregular migration as a security risk.

[89] Note the link between the first two objectives and the elements of the EU's Integrated Border Management Strategy as defined by the JHA Council: Results of the JHA Council, Brussels, 4-5 December 2006 (Council Document 15801/06), 27.

[90] Article 64(2) EC and Article 8a, Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L349/1 (hereinafter: "Frontex Regulation").

Unlike the ARGO programme, which was based on Article 66 EC, the EBF is based on Article 62(2) EC. Even if the fund does not provide for any substantive measures on the external borders or visa, this choice seems correct. Unlike its predecessors, the EBF is less concerned with cooperation between Member State authorities than with improving the functioning of these authorities independently.

The logical consequence of this choice of legal basis and the fact that the EBF is to be considered a Schengen developing measure, is the exclusion of the UK and Ireland.[91] Considering the important sums of money involved, it is useful to recall that in accordance with Article 5 of the Schengen Protocol, the UK and Ireland are to bear no financial consequences from the measure, apart from the administrative expenses for the use of the institutions. Denmark has opted-in to the decision, which also applies to the Schengen Associated Countries. For the period 2007-2009, Member States Bulgaria and Romania will, in addition to contributions from the EBF, continue to benefit from a temporary instrument under the 2006 Act of Accession, the Cash flow and Schengen Facility.

The legislative instruments aimed at achieving a degree of financial solidarity for the management of the external borders show two interesting developments. First, and most obvious, is the consistent increase in the amount of money that is reserved from the Community budget for this purpose. Second, there is a somewhat contradictory development with on the one hand more funding for individual Member States, rather than for joint projects and on the other hand a stronger Community element. While the initial programmes still required the participation of a minimum number of Member States, the EBF benefits Member States on an individual basis, reinforcing the fund's aim of redistribution. It could be seen as clear recognition that the guarding of the external borders remains the responsibility of the individual Member States. On the other hand, the Commission has been given the important task of establishing Strategic Guidelines, ensuring overall coherence of the fund's spending within the broader framework of the EU's policy for the management of the EU external borders. Importantly, it can now independently finance Community-wide actions, albeit in a limited number of fields and subject to scrutiny by a Member State Committee.

[91] One may wonder to what extent this has been a factor taken into account in deciding the legal basis, considering that at the time of the adoption of the EBF decision, Case C-77/05 and Case C-137/05, *supra* note 56, were still pending before the ECJ.

3.3 Databases, Biometrics, Information Exchange.

Already in the previous chapter the reliance on technological surveillance was identified as an important indicator as well as a catalyst for the securitisation processes. The Hague Programme emphasised the importance of biometrics and information systems as a tool for migration management, as well as crime control and prevention.[92]

Until 2007, when the Commission presented its communication on the EUROSUR system (see below), few concrete steps were taken towards the development of the PROSECUR concept coined by the Commission in its 2002 Communication.[93] Instead one could witness the proliferation of European-wide databases, as well as an increase in rules for information exchange within the AFSJ as a whole. Information exchange does not only take place at the central level, through EU-wide databases or networks, but also between Member States directly, for instance through access to information contained in (existing) national databases, as well as between private parties and Member State authorities. In fact the Hague Programme seems to prioritise this more decentralised type of information exchange, stating that: "[n]ew centralised European databases should only be created on the basis of studies that have shown their added value."[94]

An important principle to be applied in respect of decentralised information exchange is the principle of availability, meaning that "authorities responsible for internal security in one Member State or Europol officials who need information to perform their duties should obtain it from another Member State if it is accessible there."[95] This principle is particularly important in relation to subject matters covered by the Third Pillar.[96]

However, in the area of migration and border management, covered by the First Pillar, there is a primacy of centralised information exchange. A first database was established as early as 1998, still on the basis of Article K.3 TEU. The scope of the so-called European Image Archiving System (FADO) was still very limited. It allowed for the computerised exchange of information which the Member States would include in this database on false

[92] The Hague Programme, *supra* note 80, point 1.7.2.
[93] COM(2002) 233 final, *supra* note 49, 15.
[94] The Hague Programme, *supra* note 80, point 2.1.
[95] COM(2005) 597 final, Commission Communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs, 3.
[96] See Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, *OJ* 2006, L386/89; Framework Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime *OJ* 2008, L210/1; Framework Decision 2008/616 on the implementation of Decision 2008/615/JHA, *OJ* 2008, L210/12; the latter two measures essentially incorporate the provisions of the Prüm Treaty into the EU legal order. See also COM(2005) 490 final, Commission Proposal for a framework decision on the exchange of information under the principle of availability.

documents.[97] The Joint Action was adopted with reference to article K(1)(3) TEU on immigration policy, rather then Article K(1)(2) on the external borders. There would be no personal data stored, let alone biometric identifiers.

3.3.1 Centralised Databases

Three of the most important European-wide databases in the AFSJ, the Schengen Information System (SIS), the Visa Information System (VIS) and the EURODAC are, if not fully, then in part, covered by the First Pillar. These databases were the subject of scrutiny in a 2005 Commission Communication on improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs (JHA).[98] While the SIS still finds its legal basis in the CISA, its successor SISII and the two other databases have been established on the basis of Community legislation. Their development and relevance for the management of the external borders will be discussed here.

Schengen Information System

The first and most prominent database to be examined is the Schengen Information System (SIS), rightly described as the "backbone" of free movement within AFSJ.[99] The SIS contains information on persons and goods, including vehicles. Article 101 of the CISA regulates access to the SIS. Authorised are the authorities responsible for border checks, as well as the authorities responsible for police and customs checks within the Schengen area. In addition visa and migration authorities have access to data entered under Article 96 CISA (alerts for the purpose of refusing entry). Authorised authorities may only search those data they need for the performance of their specific task. The SIS only contains "alphanumeric" data (i.e.

[97] Since the end of 2007, the FADO system now also contains two multilingual systems containing unclassified subsets of information: iFADO (Intranet False and Authentic Documents Online) for control authorities only and PRADO (Public Register of Authentic Documents Online), accessible to the general public via the Council homepage (Council document 9665/08). See furthermore the Common Position on the transfer of data to Interpol on lost, stolen or misappropriated passports, *OJ* 2005, L27/61.
[98] COM(2005) 597 final, *supra* note 95.
[99] Hobbing, P., 'An assessment of the proposals of regulation and decision which define the purpose, functionality and responsibilities of the future SIS II' (EP Briefing Paper, 15 February 2006, IP/C/LIBE/FWC/2005-08), 1.

consisting of letters and numbers). Upon a positive match, national authorities can exchange further data through the so-called SIRENE bureaus.[100]

Provisions of the SIS apply simultaneously to data concerning migration control as well as crime control, thus putting the SIS in a limbo between the First and Third Pillar. When the Schengen acquis was integrated into the EU legal framework, disagreement on which would constitute the correct legal basis, the SIS came to fall under the Third Pillar by default.[101] However, all subsequent legislation related to the SIS has been adopted on a dual legal basis. In line with the UK and Ireland's partial participation in the Schengen *acquis*, these Member States have been granted access to the SIS in relation to data under the Third Pillar, but are not authorised to search migration data.

New functions, including in the fight against terrorism, were introduced in a regulation in 2004 on the basis of Article 66 EC. In 2005 a similar decision was adopted under the Third Pillar on the basis of Articles 30(1)(a) and (b) and 31(a) and (b) EU.[102] Most importantly, the 2004 Regulation granted access to national judicial authorities, including those responsible for the initiation of public prosecutions in criminal proceedings and judicial inquiries prior to indictment. One could argue that as far as criminal proceedings are concerned the broadening of access to judicial authorities should not have been achieved under the First Pillar. In any case this forms yet another example of the linking of terrorism with migration measures. The 2005 Decision confirmed the position of these authorities, whilst also granting further access to Europol and Eurojust. The latter two were however excluded from access to data inserted under article 96 CISA.[103]

As early as 2001 the decision was taken to further develop the SIS.[104] The most important reason for this SISII was to expand the maximum capacity of the system of 18 Member States to accommodate the upcoming enlargement. At the same time however it allowed for a widening of the grounds for making an entry into the system, as well as of the

[100] The SIRENE (Supplementary Information Request at National Entry) system is not mentioned in the CISA. It was given a legal basis in Article 92(4), Council Regulation (EC) No 871/2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, *OJ* 2004, L162/29.
[101] Article 2, Protocol integrating the Schengen acquis into the framework of the European Union.
[102] Council Regulation (EC) No 871/2004, *supra* note 100 and Council Decision 2005/211/JHA concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, *OJ* 2005, L68/44.
[103] See further Regulation 1160/2005 amending the CISA, as regards access to the SIS by the services in the Member States responsible for issuing registration certificates for vehicles, *OJ* 205, L191/18.
[104] Regulation (EC) No 2424/2001 and Decision 2001/886/JHA on the development of the second generation Schengen Information System (SIS II), *OJ* 2001, L328/1 and 4. Strikingly the UK also participated in the adoption of the Regulation, despite its non-participation in the Schengen *acquis* on the external borders.

categories of data that could be included.[105] The responsibility for the development of the system under both the First and Third Pillar was given to the Commission, under the control of a comitology committee acting under either the management procedure or the regulatory procedure.[106] Rather than simply declaring the comitology decision applicable, the Third Pillar decision copies the relevant procedures from that decision.

In 2006, the legislative measures on the establishment, operation and use of the second generation SIS were adopted under the First and Third Pillar.[107] Until this very day however, the system is not operative.[108] The most significant change from its predecessor is that the categories of data that can be entered on persons on whom an alert is issued will now include photographs and fingerprints.[109] In the same way as for the development measures, the Regulation and Decision give the Commission the power to take implementing measures under the supervision of a regulatory comitology committee.[110] The day-to-day management of the system is officially handed over to the Commission for a transitional period, until a so-called Management Authority has been set up.[111]

In view of the Commission's goal of a truly integrated border management, it is useful to note here that the SIS has its counterpart in the field of customs legislation in the Customs Information System (CIS).[112] Its purpose is to facilitate cooperation between Member States' authorities in the prevention, investigation and prosecution of breaches of customs legislation. The CIS stores information on commodities, means of transport, persons and companies for the purpose of sighting and reporting, discreet surveillance or specific checks.

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[105] Recitals 2 and 3, Regulation (EC) No 2424/2001, *ibid.*

[106] Article 5 and the references to that Article, *ibid*.

[107] Regulation (EC) No 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), *OJ* 2006, L381/4 and Council Decision 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II), *OJ* 2007, L205/63. These decisions repeal all provisions from the CISA regarding the SIS with the exception of those granting access to the SIS for vehicle registration authorities.

[108] A temporary solution was found in the form of an extended SIS I, the so-called SISI4all or SIS1+, see Chapter VI. The fact that this was possible shows the importance attached by the Member States to the possibility of adding new functionalities to SIS II. One of the main delaying factors were problems during the public procurement process: House of Lords Select Committee on the EU, 'Schengen Information System II (SIS II)' (HL Paper 49, Session 2006-07, 9th Report, 2 March 2007), 12-13. However the project has also been plagued by major technical difficulties: 'Test nieuw systeem grenscontrole mislukt volkomen' (*Volkskrant*, 15 January 2009).

[109] Article 20 of the Regulation and the Decision, *supra* note 107. See Chapter VI for an overview of the grounds upon which a person can be listed.

[110] See Article 51 and the references to that Article in Regulation (EC) No 1987/2006, as well as Article 67 and the references to that Article in Decision 2007/533/JHA, *supra* note 107.

[111] Article 15(4), Regulation (EC) No 1987/2006, *ibid*. However, during the transitional period the Commission may delegate that task to national public-sector bodies, in two different countries. Presumably this will be French and Austrian authorities, since the SIS is physically located in Strasbourg, France, with a back-up in Sankt Johann im Pongau, Austria.

[112] See the EU's Integrated Border Management Strategy, *supra* note 89.

Like the SIS, it has a dual legal basis. On the one hand there is a First Pillar Regulation establishing the CIS in relation to breaches of Community customs and agricultural legislation.[113] On the other hand, there is a Third Pillar, K.3. Convention in relation to breaches of national laws in the application of which Member States' customs authorities have total or partial competence, in particular those on restrictions on the free movement of goods under Article 30 EC and the arms trade derogation of Article 296 EC.[114]

Visa Information System

The Council Decision to develop a so-called Visa Information System (VIS), which allowed for the necessary appropriations to be made in the general budget, was taken in 2004.[115] It established the main structure of the system, consisting of a central VIS with national interfaces. The Commission was made responsible for the development central infrastructure, the Member States for the national parts.[116] The Commission was given implementing powers under the supervision of the committee set up by the SIS II development Regulation, acting under either the management or the regulatory procedure.[117]

A regulation concerning the VIS and the exchange of data between Member States on short-stay visas was adopted in 2008.[118] The VIS's stated objective is to improve the implementation of the common visa policy, consular cooperation and consultation between central visa authorities by facilitating the exchange of data between Member States on applications and on the decisions made in relation to these applications.[119] It is interesting to see that priority has been given by the EC legislator to the adoption of this Regulation rather than to the recasting of the Common Consular Instructions (CCI) in a Community Code on Visa.[120] One could argue that the VIS should have a supporting function in the application of the EU's visa rules and that such Visa Code would contribute more to a common visa policy than the establishment of the VIS.

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[113] Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, *OJ* 1997, L82/1.
[114] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the use of information technology for customs purposes, *OJ* 1995, C316/34.
[115] Council Decision 2004/512/EC establishing the Visa Information System (VIS), *OJ* 2004, L213/5.
[116] Article 2, *ibid*.
[117] Article 5, *ibid*.
[118] Regulation (EC) No 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas, *OJ* 2008, L218/60 (hereinafter: "VIS Regulation").
[119] Article 2, VIS Regulation.
[120] COM(2006) 403 final, Proposal for a Regulation establishing a Community Code on Visas.

On receipt of a visa request, the visa authorities will create an application file in the VIS, entering a set of data in the system, including photographs and fingerprints in accordance with the Common Consular Instructions (CCI). Regulation (EC) No 390/2009 has amended the CCI to this effect.[121] Additional data are to be added by the visa authorities when the visa is issued or refused, when the application process is discontinued or where the visa is annulled, revoked or its validity shortened. Competent visa authorities must consult the VIS for the purposes of the examination of applications and the decisions relating to those applications.[122]

The Commission is endowed with implementing powers under the supervision of the same committee set up by the SIS II Regulation, acting under either the management or the regulatory procedure.[123] Although the VIS is developed on "a centralised architecture and a common technical platform" with SIS II, the two are to remain "two different systems with strictly separated data and access."[124] As with SIS II, the Commission has been given the responsibility for the management of the system during a transitional period, until the establishment of a Management Authority.[125]

The VIS Regulation allows a number of Member State authorities who are competent to carry out checks within the Member State territory or at the border access to the system's data for the purpose of verifying the identity of the visa holder, the authenticity of the visa or whether the conditions for entry to, stay or residence on the territory of the Member States are fulfilled.[126] What is more important is that "duly authorised staff" of the same authorities may, in accordance with Article 20, access the VIS in order to identify a person for the purpose of identifying a person who may not fulfil the conditions for entry, stay or residence in the Member States.

Although Article 20(3) clearly provides that recourse to Article 20 is only had if Articles 18 or 19 do not apply, it becomes clear that this article renders the VIS a database for the identification of persons for the purpose of immigration control on the basis of their

[121] Regulation (EC) No 390/2009 amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation of the reception and processing of visa applications, *OJ* 2009, L131/1.
[122] See Chapter VI on the entry and use of data by visa authorities.
[123] See Article 49 and the references made to that Article, VIS Regulation.
[124] Council Conclusions on the development of the Visa Information System (VIS), 19 February 2004 (Council Document 6535/04), 8.
[125] Article 26(4), VIS Regulation. Again during a transitional period the Commission may delegate its powers to two national public-sector bodies in two different Member States. Because SIS II and the VIS will be sharing a common platform it is likely that this will again be French and Austrian authorities.
[126] Articles 18 and 19, VIS Regulation. See also Chapter VI.

fingerprints. Moreover the reference to "duly authorised staff of those competent authorities" in Articles 18 and 19, is much more restricted than the general "authorities competent for carrying out checks at external border crossing points in accordance with the Schengen Borders Code" referred to in Article 20.

EURODAC

A database which from the outset provided for the inclusion of biometric data is EURODAC. The Regulation establishing this database was adopted in 2000 and the system became operational on 15 January 2003.[127] The database is linked to the application of the Dublin Regulation, which establishes a series of criteria on the basis of which the responsibility for examining an asylum application is allocated to one of the Member States.[128] Its legal basis is therefore Article 63(1)(a) EC concerning the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum. The EURODAC Regulation is a measure developing a part of the Schengen *acquis* in which the UK and Ireland have opted in. Denmark and the Schengen Associated Countries (SAC) have become associated with the Dublin rules, including EURODAC through agreements under public international law.[129]

The competent authorities, which are designated by the Member States, are required to take the fingerprints of all asylum applicants in their territory over 14 years of age, as well as all third country nationals over 14 years old who are found to cross their border irregularly.[130] This includes cases where "an alien is apprehended beyond the external border, where s/he is still en route and there is no doubt that s/he crossed the external border irregularly."[131] This may serve as proof in determining responsibility under Article 10(1) of the Dublin II Regulation which states that where an asylum seeker has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for asylum. Since this

[127] Council Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, *OJ* 2000, L316/1 (hereinafter: "EURODAC Regulation").
[128] Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003, L50/1 (hereinafter: "Dublin II Regulation").
[129] See Chapter VI.
[130] Article 4 and Article 8, EURODAC Regulation.
[131] See the statements entered in the Council's minutes upon the adoption of the EURODAC Regulation (Council Document 12314/00 Add 1, 2).

responsibility ceases 12 months after the date of border crossing, the retention period of two years must be considered disproportionate.[132] Member States may choose to include a third category of fingerprints, namely those of third country nationals found to be irregularly present in their territory.[133]

The fingerprints and related data are transmitted to a Central Unit within the Commission, which is responsible for the operation of the central database and which will compare them with already stored data. The data on irregular border crossers are only recorded for the purpose of comparison with data of subsequent applicants for asylum and not with any other data submitted in relation to the irregular crossing of a border, whether previously or subsequently.[134] Under article 11(1) Member States may however compare the fingerprints of an alien found to be irregularly present within the Member State with previously lodged data on asylum.[135] General grounds for comparing the data include the situation in which an alien declares that s/he has lodged an asylum application, but does not indicate in which Member State, where the alien does not ask for asylum but objects to his/her return claiming that this would constitute a danger to him/her or where the alien seeks to prevent removal by refusal to cooperate in establishing his/her identity. Here we again see that a database which has been set up for a seemingly very specific purpose, is in reality an identification tool for the purpose of migration control.

In Article 22, the Council retained important powers for the implementation of the Regulation. First of all regarding the collection, transmission and comparison of fingerprints. Second, in relation to the blocking of data where a person has been recognised as a refugee and the drawing up of specific statistics for the purpose of a decision on whether to erase the data on persons recognised as refugees. The EURODAC Regulation was implemented by Council Regulation (EC) No 407/2002.[136]

In recital 13 the Council justifies this retention of implementing powers by reference to the ultimate responsibility of Member States for identifying and classifying the results of comparisons transmitted by the Central Unit as well as for the blocking of data relating to

[132] Peers, S., *EU Justice and Home Affairs Law* (Oxford, OUP, 2006), 324. Note that the reference to the border here extends to the borders of the UK, Ireland, Denmark and the Schengen Associated Countries.
[133] Article 11(1), Council Regulation (EC), EURODAC Regulation.
[134] Article 9(2), EURODAC Regulation.
[135] Arguably this article also covers the situation of an alien that is found on the territory of the Member States just after having crossed a border irregularly, although this situation would under the Council's interpretation be covered by Article 8, EURODAC Regulation.
[136] Council Regulation (EC) No 407/2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention, *OJ* 2002, L62/1.

persons admitted and recognised as refugees. It further states that the particularly sensitive area of the processing of personal data, which could affect the exercise of individual freedoms, should allow the Council to take implementing measures, in particular to the adoption of measures ensuring the safety and reliability of such data. The latter argument, whilst recognising the need for data protection measures, does not explain why these powers could be better exercised by the Council, rather than the Commission. The Commission was only given implementing powers in relation a possible expansion of statistical data to be collected by the Central Unit, subject to a regulatory committee procedure.[137]

The Commission in its joint evaluation of the EURODAC and Dublin System of 2007 noted some important problems in relation to the submission of data. It referred to long delays in transmission (up to 30 days).[138] Moreover, the low number of fingerprints of apprehended irregular border crossers raised doubts about Member States' compliance with this obligation.[139] Peers notes that from the outset there were widespread doubts whether border guards would be willing to take the fingerprints of all irregular border crossers.[140] Aus speaks of a deliberate non-compliance, in particular by the southern Mediterranean Member States. These Member State would have to take responsibility for asylum claims lodged in other Member States where the claimant first entered the Union at their borders.[141] A Commission proposal aims to remedy the problems identified in the joint evaluation. It sets stricter deadlines for the transmission of data, requires a clearer specification of the responsible unit of the national authorities that have access to EURODAC and the connection between their competences and the purpose of the database, and a better management of the deletion of data.[142] The proposal would also align the storage period for data on TCNs who have irregularly crossed the external borders with the period in which the Dublin II Regulation allocated the responsibility for an asylum claim.[143]

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[137] Articles 3(4) read in conjunction with 23(1), *ibid*. The Commission on the adoption of the Regulation declared that in its view the reasons for the retention of implementing powers by the Council had not been adequately or appropriately substantiated and that it would reserve its rights under the Treaty (Council Document 12314/00 Add 1, 2).
[138] COM(2007) 299 final, Report from the Commission on the evaluation of the Dublin system, 9.
[139] *Ibid*.
[140] Peers, S., *supra* note 132, 324.
[141] Aus, J., 'Eurodac: A Solution Looking for a Problem?', 10 *EIoP* 6 (2006), 12.
[142] COM(2008) 825 final, Commission Proposal for a Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EC) No […/…] [establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], 5-6.
[143] *Ibid*., 5.

Europol Information System

The Europol Information System (EIS) is mentioned here for the sake of being comprehensive. The EIS formed an integral part of the Article K.3. Convention establishing Europol, now replaced by Council Decision 2009/371/JHA.[144] Its legal basis, scope and objective are too indirectly linked to the management of the external border to qualify as a measure falling under the Schengen borders *acquis*. It is however the fourth important central database in the AFSJ. It should also be realised that in those cases in which Europol staff has been given access to any of the three previously mentioned databases, information from these databases could become included in the EIS.[145]

The EIS contains data necessary for the performance of Europol's tasks to improve Member State's law enforcement authorities in the fight against serious crimes. These crimes include illegal immigrant smuggling and trade in human beings.[146] In so far as Member States' border guard authorities are endowed with competences in preventing and combating criminal offences, they could be allowed to make a query to the EIS. The result of such a query will only indicate whether the requested data is available in the EIS. Further information may then be obtained via the Europol national unit.[147]

3.3.2 The Use of Biometrics

On various occasions the European Council has stressed the importance of biometrics. In the Thessaloniki Conclusions it stated that: "a coherent approach is needed in the EU on biometric identifiers or biometric data which would result in harmonised solutions for documents for third country nationals, EU citizens' passports and information systems (VIS and SIS II)".[148] The Hague Programme called for a "coherent approach and harmonised solutions in the EU on biometric identifiers and data."[149]

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[144] Title II, Council Act drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), *OJ* 1995, C316/1; Article 11, Council Decision 2009/371/JHA establishing the European Police Office (Europol), *OJ* 2009, L121/37.
[145] Article 21, Council Decision 2009/371/JHA, *ibid*. See also Geyer, F., 'Taking Stock: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice' (Brussels, Challenge Research Paper 9, May 2008), 19.
[146] Article 4(1), *ibid*.
[147] Article 3 read in conjunction with Article 13(6), *ibid*.
[148] European Council Conclusions, Thessaloniki, 19-20 June 2003, point 11.
[149] The Hague Programme, *supra* note 80, point 1.7.2.

Biometric data are considered an important tool in terms of document security (allowing for a so-called "one-to-one comparison"). There is moreover an obvious connection between the use of biometrics and the enhancement of databases, since biometric data will only be of value for the purpose of "one-to-more" comparisons, where they are readily available in databases.[150]

As we have observed above, the categories of data that may be included in European wide-databases have either from the outset (EURODAC, VIS), or through subsequent legislation (SISII), included the possibility of storing biometric data. In addition, the Commission has made various proposals which have included the use of biometrics as a means of improving document security.

Notwithstanding an explicit exclusion of the possibility to harmonise passports in Article 18(3) EU, the Council has on the basis of Article 62(2)(a) adopted Regulation (EC) No 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States.[151] The USA's demand that travellers from countries covered by the US visa-waiver carry a biometric passport has certainly played an important role here.[152]

A proposal to amend both the uniform visa format as well as the uniform format of third country national residence permits was made in 2003.[153] However, the technical infeasibility of the project, essentially including biometric identifiers on a sticker to be attached to the visa/residence permit, necessitated the amendment of the proposal.[154] The modified proposal, still pending, provides for the issuance of the residence permit as a stand-alone card including biometrics.[155] At the same time, the inclusion of biometric data in the

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[150] Mitsilegas, V., 'Contrôle des étrangers, des passagers, des citoyens : surveillance et anti-terrorisme', *Cultures & Conflits* 58 (2005), point 58.

[151] Council Regulation (EC) No 2252/2004, on standards for security features and biometrics in passports and travel documents issued by Member States, OJ L385/375, amended by Regulation (EC) No 444/2009, *OJ* 2009, 142/1. The UK unsuccessfully challenged the exclusion of the UK and Ireland from this regulation, which was qualified as a Schengen developing measure, in Case C-137/05, *UK v Council* [2007] ECR I-11593, see Chapter IV. See for a critique on the choice of legal basis: Peers, S., 'The legality of the Regulation on EU Citizens' passports' (Statewatch Analysis, 2004).

[152] Section 303, Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 (H.R. 3525). See on how the USA influences European security and border policies in more general: Argomaniz, J., 'When the EU is the 'Norm-taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms' 31 *European Integration* 1 (2009), 119-136. The author identifies three interrelated stages: unilateral and forceful norm advocacy by the USA, negotiation and bargaining and, eventually, norm mirroring.

[153] COM(2003) 558 final, Commission proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas and a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals.

[154] See Council Document 14534/04.

[155] COM(2006) 110 final, Modified Commission proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals.

VIS substitutes their inclusion on the visa itself. The logical consequence of this is that upon entering the EU, comparisons between the person presenting the visa and the information in the VIS can only be made by comparing the data in the VIS with the fingerprints and facial characters of these people, which could seriously disrupt passenger flows.

3.3.3 Databases beyond Control?

It has already been noticed that both the VIS and EURODAC Regulation include provisions which render these databases identification tools for the general purpose of migration control. At the same time one can observe the granting of access rights to increasingly broad categories of "competent authorities."[156] Access to the SIS has been widened to include national judicial authorities, as well as Europol and Eurojust. The proposal for the Regulation on SISII added asylum authorities and authorities responsible for expulsion to this list.[157] The final text however, retains the more general definition of Article 110 CISA.[158]

Europol and Eurojust remain excluded from access to data entered in the SISII under Regulation (EC) No 1987/2006, yet a similar restraint is absent in relation to the VIS. Under Article 21 of the VIS Regulation asylum authorities have a right of access. Moreover, Decision 2008/633/JHA, the so-called VIS police access decision, grants "designated authorities of the Member States" and Europol access to the VIS for the purpose of prevention, detection and investigation of terrorist offences and other serious criminal offences.[159] Here it is interesting to note that the UK and Ireland have been excluded from participation in this decision. The Council considers it to be a Schengen developing measure, which however seems to fail to appreciate the true nature of the measure in question. The UK has brought an annulment proceeding, in which it argues correctly that the decision is a police matter covered by Title VI EU. This would mean that the UK and Ireland should be allowed to participate. If the measure was considered as developing the Schengen visa *acquis*, it

[156] It should be noted that the notion of "competent" or "designated authorities" itself may be interpreted extensively and Member States' practice shows considerable divergences in this respect: Geyer, F., *supra* note 145, 7.
[157] Article 18, COM(2005) 236 final, Commission Proposal for a Proposal for a Regulation on the establishment, operation and use of the second generation Schengen information system (SIS II).
[158] Article 27, Regulation (EC) No 1987/2006, *supra* note 107. According to Peers this broad definition could however be interpreted so as to include these authorities: Peers, S., 'Schengen Information System (SIS) II' (Statewatch Summary, June 2006), 6.
[159] Decision 2008/633/JHA, concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, *OJ* 2008, L218/129.

should have been adopted under Title IV EC, although this would gravely disregard the true nature of the measure.[160] It is interesting to note that Ireland mentions that it has been agreed in principle that both the UK and Ireland will eventually have limited access to VIS.[161]

For some time now there has been discussion on the possibility of extending the scope of EURODAC "with a view to use its data for law enforcement purposes and as a means to contribute to the fight against illegal immigration."[162] The Council has already concluded that "the biometric information contained in EURODAC may be under specific circumstances the only information available to identify a person suspected of committing or having committed an act of terrorism or other serious crime."[163] While the German delegation was said to be drafting a proposal for a Council decision, it was the Commission that in July 2009 tabled such a proposal.[164] This is a text-book example of how a security continuum is created in which asylum is being linked to terrorism and crime, which may subsequently be confirmed in legislation.

As Mitsilegas has correctly pointed out, the interoperability of databases deprives of all effect the safeguards based on the principle that access and use and limited for a specific purpose.[165] This holds true in general terms where the access to, the use of and the categories of data that are included are consistently broadened. The European Data Protection Supervisor (EDPS) has pointed out in his reaction to the 2005 Communication on the inter-operability of databases that making access to or exchange of data technically feasible, which is highly probable where databases use a common technical platform, this may become a "powerful drive for *de facto* acceding or exchanging these data".[166] This echoes Huysman's argument that security practices may inform policy decisions rather than *vice-versa*.[167]

A strong push towards a uniform management of these various databases, notwithstanding their different purposes, cross-pillar nature and the variable geometry, is given in the Commission's 2009 proposal for the establishment of a regulatory agency for the

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[160] Case C-482/08, *UK v. Council* (Council Document 16111/08).
[161] Council Document 13403/08.
[162] COM(2007) 299 final, Report from the Commission on the evaluation of the Dublin system, 11.
[163] Council Document 8688/07, Draft Council Conclusions on access to Eurodac by Member State police and law enforcement authorities.
[164] Council Document 16982/06; 'Commission wants to open up Eurodac database to police' (*European Voice*, 2 July 2009). At the time of writing this proposal was not yet publicly available.
[165] Mitsilegas, V., *supra* note 150, point 62.
[166] EDPS, Comments on the Communication of the Commission on interoperability of European databases Brussels, 10 March 2006), 2: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2006/06-03-10_Interoperability_EN.pdf
[167] Huysmans, J., *The Politics of Insecurity: Fear, migration and asylum in the EU* (London, Routledge, 2006), 8-9.

operational management of large-scale IT systems in the AFSJ.[168] The Agency would create a "joint operational management structure" and constitute the "management authority" referred to in the founding acts of the databases.[169] The option of a regulatory agency was preferred over that of management by a Member State, as is currently the case for the SIS, the Commission or an existing Agency.[170] It forms a clear example of the delegation of "technical" tasks which do not entail an autonomous decision making power to an independent administrative body outside the Commission.

The development of EU databases in the AFJS also shows an opportunist use of the competences in the area of migration and border management. While it would have probably been much more difficult to establish a centralised database containing biometric data for the purpose of justice and police cooperation alone, once these database had been established under the Title IV EC, their use could be expanded relatively easily in areas covered by the Third Pillar. The securitization of migration has not only facilitated this expansion into Third Pillar territory, but in turn is likely to have been reinforced by this development.

Without discussing at length here the rules on data protection, it should be stressed that the sheer amount of data stored, the nature of these data (personal, biometric), the numerous access points and broad access rights, all raise legitimate concerns in terms of data protection. An example of where these concerns seem to be justified is the application of Article 18 of the EURODAC Regulation. This article allows for so called "special searches" carried out by Member States at the request of data subjects to check information on their own data. The Commission in its evaluation of the Dublin system reports a "surprisingly high number" of searches which it seems to interpret, albeit not explicitly, as a sign that improper searches have been carried out.[171]

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[168] The Council Conclusions on the Commission's 2008 "Border Package" had called upon the Commission to come forward with legislative proposals for the purpose of the long term operational management of SIS II, VIS and EURODAC (Council Document 9873/08, point 20).

[169] COM(2009) 292 final, Commission Communication, 'Legislative package establishing an Agency for the operational management of large scale IT systems in the area of freedom, security and justice. This legislative package in fact contains two proposals, one for a Regulation establishing the Agency and covering the First Pillar elements of the databases (COM(2009) 293 final) and one for a Council Decision conferring upon that Agency the tasks regarding the operational management of SIS II and VIS in application of Title VI of the EU Treaty (COM(2009) 294 final).

[170] COM(2009) 293 final, *ibid.*, 7. See also Hobbing, P., 'An Analysis of the Commission Communication (Com(2005) 597 Final of 24.11.2005) on Improved Effectiveness, Enhanced Interoperability and Synergies among European Databases in the Area of Justice And Home Affairs' (EP Briefing Paper, 31 January 2006, IP/C/LIBE/FWC/2005-08), 4. He has already argued that such an agency could be responsible for further related databases, considering that the joint management of the SISII, VIS and EURODAC alone may be "too limited to achieve a full-size management structure"

[171] COM(2007) 299 final, *supra* note 162, 10.

Article 8 ECHR on the right to privacy, enshrining a principle common to the constitutional traditions of the Member States, would form a broadly formulated guarantee for the protection of data under both the First and Third Pillar.[172] The separate legal bases for the establishment of the databases, as well as the rules on access to them, mean however that they are covered by a fragmented data protection regime.[173]

Within the First Pillar data held by the Member States fall under Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[174] Those held by the EU institutions are covered by Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.[175] However, the databases' founding regulations contain many "specifications" to these rules.[176]

Under the Third Pillar, the Convention of the Council of Europe of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data is made applicable.[177] The Framework Decision on data protection in police and judicial cooperation in criminal matters (DPFD) applies also to processing of data under those parts of the SIS II covered by the Third Pillar and by the VIS police access decisions.[178] However, the proposal for the Framework Decision has already received harsh criticism for failing to provide for an adequate level of protection, due to its limited scope and lowest common denominator approach.[179] Moreover, the DPFD is to have no application where in previously adopted acts specific conditions have been introduced as to the use of such data by the receiving Member State.[180]

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[172] Case 36/75, *Rutili* [1975] ECR 1219, para. 32. See on the right to family life as covered by Article 8 ECHR *inter al*. Case C-60/00, *Carpenter* [2002] ECR-I 6279, para. 41.
[173] Hobbing, *supra* note 99, 5 and Mitsilegas, V., *supra* note 150, point 63.
[174] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* 1995, L281/31.
[175] Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ* 2001, L8/1. Article 7 regulates the exchange of personal data between Community institutions or bodies.
[176] See Chapter VI of the SIS II, VIS and EURODAC Regulations.
[177] See for instance Article 57, Council Decision 2007/533/JHA, *supra* note 107 and Article 8, Council Decision 2008/633/JHA, *supra* note 159.
[178] Recital 21, Decision 2007/533/JHA, *ibid.* and Recital 9, Council Decision 2008/633/JHA, *ibid.* Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, *OJ* 2008, L350/6 (hereinafter: "DPFD").
[179] See in particular the Third opinion of the EDPS on the proposal, *OJ* 2007, C139/1, as well as the Declaration adopted by the European Data Protection Authorities in Cyprus on 11 May 2007: http://europoljsb.consilium.europa.eu/documents/37AECF0B-3D0F-4DAA-95F2-C3890C28F3D3.pdf
[180] Article 28 on the Relationship to previously adopted acts of the Union, DPFD.

3.3.4 ICO-Net

A decentralised mechanism for the exchange of information relating to migration management was set up by Council Decision 2005/267/EC establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services.[181] A detailed decision specifying the functioning of the system was adopted by the Commission under the advisory comitology procedure.[182]

ICO-Net is essentially a web-based intranet site, managed by the Commission, through which strategic, tactical or operational information for the purpose of migration management can be exchanged. It does not contain any personal data. Access is reserved to migration management authorities, which in the Commission's implementing decision are defined as "any governmental, administrative or law enforcement authorities of the Member States responsible for execution of management."[183]

The ICO-Net includes first of all the early warning system on illegal immigration and facilitator networks, which was set up by a Council Resolution of 27 May 1999.[184] It furthermore encompasses a network of immigration liaison officers (ILOs), information on the use of visas, borders and travel documents in relation to illegal immigration and return-related issues.[185] In as far as the ICO-Net is used for the exchange of information on false documents there is an obvious overlap with the FADO system. A recent Commission Proposal would amend the Regulation establishing the ILO network, obliging Member States to make information regarding the posting of ILOs and the information obtained by these ILOs available on the ICO-Net.[186]

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[181] Council Decision 2005/267/EC, *OJ* 2005, L83/48.
[182] Commission Decision of 15 December 2005, laying down detailed rules for the implementation of Council Decision 2005/267/EC establishing a secure web-based Information and Coordination Network for Member States' Migration Management Services.
[183] Article 2(a), *ibid*.
[184] This early warning system was originally managed by the so-called Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI). This "Centre" was set up in by the JHA Council Conclusions of 30 November 1994. It is composed of experts from the Member States which meet monthly with logistical support from the General Secretariat of the Council. The CIREFI forms a good example of the "executive role" of the Council.
[185] Immigration liaison officer is defined in accordance with Article 1(1) of Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network, *OJ* 2004, L64/1: a representative of one of the Member States, posted abroad by the immigration service or other competent authorities in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration.
[186] Article 1(1), COM(2009) 322 final, amending Articles 3(1) and 3(3) of Regulation (EC) No 377/2004, *ibid*.

3.3.5 Advanced Passenger Information

Information exchange for the purpose of border management also takes place between private parties and Member States' authorities. Directive 2004/82/EC obliges air carriers to transmit so-called Advanced Passenger Information (API) to the border guard authorities of the Member States of destination. API includes all data elements which travellers have to present at the border control in the destination country, such as identity, nationality, travel documents, visa.[187] It could be described as a "pre-arrival manifest sent to the border authorities of the destination country."[188] In the words of the Commission it serves to "alert the border guard authorities on risky passengers."[189] API data cannot be used for the purpose of preventing a person from arriving at the border crossing point of the Member State of destination.[190] API should be distinguished from Personal Name Record (PNR) data which airlines have always stored in relation to flight reservations and include a wide range of information such ticketing information, payment/billing information (e.g. credit card number), itinerary, etc.

The Directive finds its legal basis in Articles 62(2) and Article 63(3) EC. The double legal basis has enabled the UK and Ireland to participate in the measure. The Directive was proposed by a Member State, Spain, during the transitional period and adopted right before the expiry thereof, thus under unanimity.[191] The fact that the Directive had to be adopted before the end of the transitional period, since otherwise the proposal would fall, meant that not only was there considerable pressure on the Member States to endorse the proposal, it also meant that the Parliament was not consulted.[192]

It should be noted that, unlike PNR, API were not previously collected.[193] As such there is an additional burden for the industry, which in case of non compliance is subject to carrier sanctions.[194] Although the API under the Directive are only collected in relation to flights in-bound for the European Union, they are collected for all passengers, including

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[187] Directive 2004/82/EC, on the obligation of carriers to communicate passenger data, *OJ* 2004, L261/24.
[188] Hobbing, P., 'Tracing Terrorists: The EU-Canada Agreement in PNR Matters' (Brussels, CEPS Special Report, September 2008), 9.
[189] COM(2008) 69, Commission Communication, 'The Next Steps in Border Management in the European Union', 3. Risky should be read here in terms of irregular migration, but inevitably evokes associations with crime and terrorism.
[190] *Ibid*.
[191] This means that the argument made in the previous chapter, namely that Member States have used Title IV legislation in order to circumvent the unanimity requirements from the Third Pillar does not hold in this particular case.
[192] Mitsilegas, V., *supra* note 150, point 16. [192] Recital 5 of Directive 2004/82/EC, *supra* note 187, states that the Council had exhausted all possibilities to consult the Parliament.
[193] Hobbing, P., *supra* note 188, 9.
[194] Article 4, Directive 2004/82/EC, *supra* note 187.

persons who have a Community right to free movement, One could argue that this systematic collection of data on EU citizens is contrary to the free movement provisions of the EU treaty, in particular in relation to the information that border guards may require from EU nationals upon entry.[195] In view of the official purpose of the Directive, namely migration management, the collection of API from EU citizens is not necessary.

The Directive serves to show that many of the measures adopted under Title IV EC have a strong security logic, which extends beyond immigration and border management to crime control. Article 6(1) of the Directive provides that after entry of the passenger, authorities must delete the data within 24 hours after transmission by the airline, "unless the data are needed later for the purposes of exercising the statutory functions of the authorities responsible for carrying out checks on persons at external borders." Moreover, Member States may also use the personal data for law enforcement purposes. The latter purpose is particularly vague and the Article 29 Data Protection Working Party has advocated that Member States apply this derogation restrictively by clearly setting out the specific cases in which the data may be used for this purpose.[196] The House of Lords openly questioned the value of the collection of API as a tool to combat organised crime or threats to national security.[197] However, since not all Member States have yet implemented the Directive, an evaluation of the usefulness of these data cannot be made yet.[198]

The security logic of the Directive is also very much present in the political discourse both before and after its adoption. The second recital of the Directive specifically refers to the European Council's declaration on combating terrorism, in which it stressed the need for the adoption of the Directive. Giving evidence before the House of Lords EU Committee, an official from the UK Home Office was quoted saying that the proposal "is all about border control, whether it is illegal immigration or criminals coming in, or people who are a threat to national security".[199] The Commission consistently lists the Directive as one of the measures the EU has adopted in the fight against terrorism.[200] As Mitsilegas has pointed out the framing of the proposal as a security measure also colours the assessment of the proportionality of the

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[195] See by analogy Case 157/79, *Pieck* [1980] ECR 2171, para 10 and Case C-68/89, *Commission v. Netherlands* [1991] ECR I-2637, para. 13. See chapter V.

[196] This Working Party was set up on the basis of Article 29 of Directive 95/46/EC, supra note 174. See Opinion 9/2006 on the Implementation of Directive 2004/82/EC of the Council on the obligation of carriers to communicate advance passenger data (27 September 2006).

[197] House of Lords Select Committee on the EU, 'Fighting illegal immigration: should carriers carry the burden?' (HL Paper 29, Session 2003-04, 5th Report, 12 February 2004), 7.

[198] House of Lords Select Committee on the EU, 'The Passenger Name Record (PNR) Framework Decision' (HL Paper 106, Session 2007-08, 15th Report, 11 June 2008), 13.

[199] *Ibid*.

[200] Commission, 'Commission Activities in the Fight against Terrorism' (12 March 2007, MEMO/07/98).

proposal which should be made by reference to its purpose of immigration and border management rather than terrorism and crime control.[201]

Directive 2004/82/EC and the collecting of API is a separate issue from the collection of PNR data. PNRs contain more data elements and are available in advance of API data. They are considered an important tool for risk assessments, to obtain intelligence and to profile people.[202] PNR data are being exchanged with the USA, Canada and Australia on the basis of agreements concluded by the EU.[203] All three agreements have however also included the exchange of API.

As the Commission stated, the transmission of PNR data takes place for the purpose of preventing terrorism and organised crime, not for the sake of border checks. Nevertheless, the agreements with the US and Canada were initially adopted under the First Pillar, on the basis of Article 95 conferring upon the institutions the power to adopt legislation for the harmonisation of the internal market. This was essentially done because the Commission considered that Directive 95/46/EC, which has as its legal basis in Article 95 EC, was applicable to the Agreement.[204] In an action for annulment brought by the Parliament, the Court held however that its subject matter covered "public security and the activities of the State in areas of criminal law", which were outside the material scope of the Data Protection Directive.[205] It did not engage in an analysis of whether Article 95 could have served as a legal basis independently from the Directive and the Courts assumption that the agreement would have to be terminated, seems to imply that the scope of the agreement was outside the

[201] Mitsilegas, V., *supra* note 150, point 10.
[202] The House of Lords Select Committee on the EU, which was very critical of the API Directive, in relation to PNR data reluctantly stated that "having received no evidence to the contrary" it was prepared to believe in their usefulness as a means of fighting terrorism and serious crime: House of Lords Select Committee on the EU, 'The EU/US Passenger Name Record (PNR) Agreement' (HL Paper 108, Session 2006-07, 21st Report, 5 June 2007), 12. In a second report however it concluded on the basis of additional, not published data, that "PNR data, when used in conjunction with data from other sources, can significantly assist in the identification of terrorists, whether before a planned attack or after such an attack": House of Lords, *supra* note 198, 19.
[203] Agreement between the EU and the USA on the processing and transfer of PNR data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), *OJ* 2007, L204/18; Agreement between the EC and the Government of Canada on the processing of API and PNR data, *OJ* 2006, L 82/15; Agreement between the EU and Australia on the processing and transfer of EU sourced PNR data by air carriers to the Australian customs service, *OJ* 2008, L 213/49.
[204] Directive 95/46/EC, *supra* note 174, in particular Chapter IV on the transfer of personal data to third countries.
[205] Joined Cases C-317/04 and C-318/04, *European Parliament v Council and Commission* ("PNR") [2006] ECR I-4721, para. 56. See Article 3(2), Directive 95/46/EC, *ibid*.

First Pillar altogether. Indeed, later agreements have been adopted under the Third Pillar instead.[206]

The PNR scheme is now likely to be duplicated at EU level in an EU PNR Framework Decision. The original proposal covered only EU inbound air transport and PNR was only to be collected for the purpose of fighting terrorism and organised crime.[207] In the Council however there have been discussions on extending the purpose of the PNR exchange also to serious crime, which could then include also the facilitation of unauthorised entry and residence.[208] Moreover, some Member States have been in favour of using PNR for the broader purpose of customs and immigration management.[209] The Commission however signalled that in view of Article 47 EU it would be difficult to include such provisions in Third Pillar legislation, as these are clearly covered by the First Pillar.[210]

3.4 Measures Penalising Illegal Entry, Smuggling and Trafficking

In the area of migration and border management, the European legislator has been much aware of the distinction between the First and Third Pillar, mindful also of the Court's affirmation that "in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible."[211] As we will see however, this may change now that the Community has successfully claimed a (limited) competence in matters of criminal law, ancillary to its powers under the First Pillar.

Whilst the activities caught under the heading of human trafficking have for a long time constituted serious offences under the criminal law of the Member States, the dominant perspective on irregular entry and stay, as well as on human smuggling, has only more recently become that of criminal law.[212]

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[206] Cremona, M., 'EU External Action in the JHA Domain: A Legal Perspective' (Florence, EUI Law Working Paper 24, 2008), 17. See also: Gilmore, G. and Rijpma, J.J., 'Annotation Joined Cases C-317/04 and C-318/04', 44 *CMLRev* 4 (2007), 1081-1099.
[207] COM(2007) 654 final, Commission Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purpose.
[208] House of Lords, *supra* note 198, 37-38.
[209] *Ibid*.
[210] *Ibid*.
[211] Case 203/80 *Casati* [1981] ECR 2595, para. 27, and Case C-226/97 *Lemmens* [1998] ECR I-3711, para. 19
[212] Van Liempt, I., 'Inside Perspectives on the Process of Human smuggling' (IMISCOE Policy Brief 3, August 2007).

Illegal entry

Article 3(2) of the CISA obliged Contracting Parties to introduce penalties for the unauthorised crossing of external borders at places other than crossing points or at times other than the fixed opening hours. Although this article did not require sanctions under criminal law, under the jurisprudence of the European Court of Human Right (ECtHR), not the classification, but the general character of the rule and purpose of the penalty, being both deterrent and punitive, determine the criminal nature of the offence.[213] The SBC, which replaces Article 3(2) CISA in Article 4(3), adds the often repeated formula that penalties shall be "effective, proportionate and dissuasive". This does not exclude criminal sanctions, bearing in mind that "infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance."[214]

Smuggling

Article 27 CISA obliged Member States to "impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens." Although both Article 3 and Article 27 were assigned a legal basis under the First Pillar (Article 62(2) and Article 63(3) EC respectively), the Council Decision did explicitly add "whilst recognising that the determination of the nature, modalities and severity of the penalty provisions required under this article is a matter for the Member States".[215] Reflecting this *caveat*, the Council in 2002 adopted a directive defining the facilitation of unauthorised entry, transit and residence on the basis of Articles 61(a) and Article 63(3)(b)

[213] *Engel and others v. The Netherlands* (Appl. No. 5100/71), ECtHR, 8 June 1976, para. 81-82 and *Ozturk v. Germany* (Appl. No. 8544/79), ECtHR, 21 February 1984, para. 50-53. Even so, in a number of EU Member States, including Belgium, France, Germany, Greece, Ireland, Italy and the UK, irregular entry and stay are classified as criminal offences. Council of Europe Commissioner for Human Rights has recently spoken out against the criminalisation of migration: Thomas Hammarberg, 'It is wrong to criminalize migration' (Viewpoints, 29 September 2008)
[214] Case 68/88, *Commission v Greece* ("Greek Maize") [1989] ECR 2965, para 24.
[215] Council Decision 1999/436/EC, *supra* note 45.

EC and a Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence under the Third Pillar .[216]

There is a clear link between the Directive and the Framework Decision. The Framework Decision in Article 1(1) refers back to the offences as defined in the Directive. Under Article 1(1) of the Directive each Member State must adopt "appropriate sanctions" on any person who intentionally assists a person who is not a national of a Member State to enter, or transit, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens. There is no requirement of financial gain. Article 1 of the Framework Decision prescribes the imposition of criminal sanctions and harmonises maximum penalties.

Article 1(2) of the Directive states that the Member States may decide not to impose sanctions where the aim of helping someone to enter the Member State was to provide humanitarian assistance. This is however not an obligation and the Directive lacks any reference to the protection afforded to refugees and asylum seekers in accordance with international law and human rights instruments. The Framework Decision does contain such reference in Article 6. It should be recalled that although international refugee law does not grant a right to asylum, it does grant a right to ask for asylum and the principle of *non-refoulement* applies also to rejection at the border.[217]

Human Trafficking

A 2002 Framework Decision on combating the trafficking in human beings for the purposes of labour exploitation or sexual exploitation addresses the related issue of trade in human beings.[218] Peers rightly notes that, although there is no cross-border element required for the offence, in practice this is often the case, which is why it is mentioned here.[219]

The main difference between smuggling and trafficking is the consent of the person being smuggled and the coercion of the person being trafficked. In Dauvergne's words:

[216] Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, *OJ* 2002, L 328/17 and Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, *OJ* 2002, L328/1.
[217] See also Chapters II and VI.
[218] Framework Decision 2002/629 on Combating Trafficking in Human Beings for the Purposes of Labour Exploitation or Sexual Exploitation, *OJ* 2002, L203/1.
[219] Peers, S., *supra* note 132, 270.

"drawing the line between trafficking and smuggling is about assigning guilt."[220] A person being smuggled has knowingly and willingly infringed migration laws.

The dividing line between smuggling and trafficking is however less strict than may appear from the law. Often a situation of trafficking flows from the smuggling of migrants. Framework Decision 2002/629 imposes the same maximum penalties as Framework Decision 2002/946/JHA, which in view of the relative gravity of the offence is remarkable.[221] It is however clear that the emphasis of both measures is on law enforcement, rather than on what one would wish to be the case for the Framework Decision on Trafficking, the protection of the victims.[222]

The Palermo Protocols

Under public international law the Protocol on the smuggling of persons and the Protocol on the trafficking of persons, the so-called Palermo Protocols attached to the UN convention on organised crime, aim to reinforce the fight against these activities under an instrument of public international law.[223] Articles 6 of the Smuggling Protocol and Article 5 of the Trafficking Protocols oblige contracting parties to criminalise human smuggling and trafficking. Article 5 of the Smuggling Protocol does state that the persons smuggled should not themselves become liable to criminal prosecution. However, both Protocols are essentially security measures, which in the case of the Trafficking Protocol may be concealed to some extent by the (limited) concern for the protection of the victims of trafficking.[224]

Of particular importance for the purpose of the management of the external borders are the provisions of Chapter Three of both Protocols, titled "Prevention, Cooperation and other measures." Article 11 deals with border measures specifically, calling for a strengthening of border controls as necessary to prevent trafficking and smuggling. In accordance with Article 11(6) Contracting Parties must consider the strengthening of the cooperation between border control agencies. Of importance is further Chapter Two of the Smuggling Protocol which deals with the smuggling of migrants at sea, calling upon

[220] Dauvergne, C., *Making People Illegal: What Globalization means for Migration and Law* (Cambridge, CUP, 2008), 91.
[221] *Ibid*.
[222] Obokata, T., 'EU Action against Trafficking of Human Beings: Past, Present and the Future', in: Guild, E. and Minderhout, P., *Immigration and Criminal Law in the European Union* (Martinus Nijhoff Publishers, Leiden, 2006), 403.
[223] The Smuggling Protocol entered into force on 28 January 2004, the Trafficking Protocol on 25 December 2003.
[224] Dauvergne, C., *supra* note 220, 73.

Contracting Parties to "cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea".[225]

Since the Protocols cover subjects that are in part Community competence and in part Member State competence, both the Community and the Member States have become parties.[226] The Commission initially proposed a decision for the conclusion of the protocols on the basis of the implied powers under Articles 62(2) and 63(3) EC.[227] In the mean time however a number of legislative measures were adopted internally, covering various elements of the Protocols. Most important were the AENEAS Programme, based on Articles 179 and 181a EC (development cooperation and cooperation with third countries) and the Regulation establishing the External Borders Agency Frontex, based on Articles 62(2)(a) and 66 EC.[228] The Commission therefore decided to add Articles 179, 181a EC and 66 EC to the legal basis of the proposal.[229]

Eventually, the Council decided to adopt two separate decisions for each of the Protocols: one dealing with the aspects falling under the Community's development policy, fully applying to the UK, Ireland and Denmark and one on the basis of its competences in Title IV EC, applying to the UK, Ireland and Denmark only in as far as they have opted in to legislation internally.[230] For all other parts the UK and Ireland, as well as Denmark, are bound on the basis of their signature and ratification under public international law. All SAC are parties to the Palermo Protocols under public international law.

What should be emphasised here is that, notwithstanding the fact that the Protocols criminalise certain behaviour, they have been concluded by the Community on the basis of Title IV EC only. On the one hand, one could argue that these provisions fell within Member State competence. On the other hand, the existence of EU legislation criminalising trafficking

[225] We will return to these provisions in Chapter X.
[226] The Protocols are therefore "mixed agreements".
[227] COM(2003) 512 final. See for a full overview of internal legislation and the question of legal basis Council Document 7603/05.
[228] Regulation (EC) No 491/2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), *OJ* 2004, L80/1 and the Frontex Regulation, *supra* note 90.
[229] COM(2005) 503 final.
[230] Council Decision 2006/616/EC on the conclusion of the Smuggling Protocol, in so far as its provisions fall within the scope of Articles 179 and 181a EC, *OJ* 2006, L262/24; Council Decision 2006/617/EC on the conclusion of the Smuggling Protocol, in so far as its provisions fall within the scope of Part III, Title IV EC, *OJ* 2006, L262/34; Council Decision 2006/618/EC on the conclusion of the Trafficking Protocol, in so far as its provisions fall within the scope of Articles 179 and 181a EC, *OJ* 2006, L262/44; Council Decision 2006/619/EC on the conclusion of the Trafficking Protocol, in so far as its provisions fall within the scope of Part III, Title IV EC, *OJ* 2006, L262/51.

and smuggling would have justified signature by the EU, in addition to signature by the EC.[231] In this respect it is interesting to note that the discussion on the declaration on Community competence to be attached to the Protocols was conducted in the CATS, rather than SCIFA, confirming once more the security objective of these protocols.

In the *Environmental Penalties* case the ECJ held the Community legislator is not precluded from prescribing criminal sanctions when it considers this to be necessary in order to ensure the respect for and efficacy of the Community rules in an area of EC competence.[232] Rather, Article 47 EU precludes the possibility of adopting such measures under the Third Pillar where the aim and content of the measure are covered by a First Pillar legal basis.[233]

This issue was however not at all raised by the Member States, while at the time of the adoption of the Decisions, they had far from accepted the consequences drawn by the Commission from the Court's ruling in *Environmental Penalties*. In the *Ship Source Pollution* case, dating from after the adoption of the Decisions on the Palermo Protocols, as many as 19 Member States intervened arguing against the imposition of criminal sanctions by the Community.[234] It could of course be argued that the imposition of criminal sanctions in the particular case of the Palermo Protocols did not matter much to the Member States since they were already obliged to impose criminal sanctions on the basis of the Framework Decisions. Yet, the fact that the fight against migrant smuggling is seen as being of major importance in the fight against irregular migration and that particular attention was paid to the smuggling of migrants by sea, may have played a bigger role.

The Court in *Ship Source Pollution* confirmed its earlier ruling in *Environmental Penalties*, even if it did find that "the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence."[235] The conclusion therefore is that under the law as it stands, the provisions of Title IV EC on irregular migration and border management may include the criminalisation of certain activities.[236] The Palermo Protocols were correctly adopted under the First Pillar and in

[231] As was the case, for instance, when the Schengen Association Agreement was signed with Switzerland: Council Decision 2004/849/EC (*sic*) (*OJ* 2004, L368/26) and Decision 2004/861/EC (*OJ* 2004, L370/78) on the signing, on behalf of the EU and the EC respectively, of the agreement with Switzerland concerning the association with the implementation, application and development of the Schengen *acquis*.
[232] Case C-176/03, *Commission* v. *Council* ("Environmental Penalties") [2005] ECR I-7879, para. 48.
[233] Discussions between the Council and Commission rather concerned the extent of Community competence in the areas covered by the Protocols (Council Document 7603/05), see in more detail Chapter X.
[234] Case C-440/05, *Commission* v. *Council* ("Ship Source Pollution") [2007] ECR I-9097.
[235] *Ibid*, para. 70.
[236] In fact one of the first areas in which the Community made use of its complimentary criminal law competence was in the area of irregular migration: Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ* 2009, L168/24.

retrospect the prescription of criminal sanctions in Framework Decision 2002/946/JHA could, or rather should, have been included in Directive 2002/90/EC. An unintended result of the Court's case law is therefore that in the area of migration management it allows for a reinforcement of the security continuum, linking migration and crime in a single instrument.

3.5 Institutional Measures for the Coordination of Operational Cooperation

Article 16 of the SBC provides that "Member States shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border control."[237] Operational cooperation has been one of the cornerstones of the EU's policy for the management of the external borders. Many of the legislative measures discussed so far, either enable or facilitate operational cooperation between border guard authorities, through financial support or information exchange.

The 2002 Commission Communication put much emphasis on the concept of operational burden sharing, pooling not only financial but also human and technical resources and proposing the establishment of a European Corps of Border Guards.[238] The Council's Action Plan on the External Borders was more careful. Reluctantly it concluded that "institutional steps could be considered", which "could include a possible decision on the setting up of a European Corps of Border Guards."[239] Rather it advocated the establishment of a "polycentric" network structure consisting of *ad-hoc* centres specialising in different areas of border management.[240] It called for joint operations of national border guard agencies at the external borders and the creation of national contact points. It further followed the Commission's suggestion to set up a Common Unit of External Border practitioners falling under the Council's Strategic Committee on Immigration, Frontiers and Asylum (SCIFA).

The Common Unit (or SCIFA+) consisted of the members of SCIFA and the heads of Member States' border control services. Its task was to oversee the development of a common policy on the external borders and act as a coordinator for the network structure and the joint operations proposed in the Action Plan. It was explicitly mentioned that SCIFA+ did not

[237] See also Article 7, CISA and Point 4, Common Manual, *OJ* 2002, C313/13.
[238] COM(2002) 233, *supra* note 49.
[239] Council Document 10019/02, point 120.
[240] Here it was informed by an Italian-led feasibility study into the setting up of a European Border Police: Monar, J., *supra* note 55, 196.

encroach upon the Commission's powers in this field, stating that it would not involve legislative proposals nor implementing measures in the meaning of Article 202 EC."[241]

Between July 2002 and March 2003, SCIFA+ approved a total number of 17 different programmes, ad-hoc centres, pilot projects and joint operations.[242] The Council always maintained that these constituted intergovernmental cooperation arrangements between Member States. The presidency's report on the implementation of the joint activities expressly referred to a lack of legal basis for the setting up of *ad-hoc* centres and the carrying out of common operations.[243] It further listed a number of concerns in relation to the operational cooperation which ranged from a lack of suitable planning, preparation and central operational coordination to adequate evaluation.[244]

The Commission in the run up to the Thessaloniki European Council noted that the limitations of SCIFA+ as a working party had been demonstrated.[245] These limitations related to its large membership and wide agenda, but presumably also to a lack of a common approach.[246] The Commission proposed that while "certain more strategic co-ordination tasks could remain with SCIFA+, the more operational tasks could be entrusted to a new permanent Community Structure".[247] Consequently, SCIFA+ was substituted by the Practitioners' Common Unit (PUC), consisting of only the heads of Member States' border guard services. It would deal exclusively with operational issues, while SCIFA would remain responsible for the general strategy to set up an integrated border management system.[248]

The Thessaloniki European Council emphasized the importance of determining a more structured framework and the necessity for creating new institutional frameworks in order to

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[241] Council Document 10019/02, point 47.
[242] Council Document 14708/02.
[243] Council Document 10058/1/03, 9-10.
[244] *Ibid*, 35.
[245] COM(2003) 323 final, Commission Communication in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, 7.
[246] House of Lords Select Committee on the EU, 'Proposals for a European Border Guard' (HL Paper 133, Session 2002-03, 29th Report, 1 July 2003), 14. A Council official during informal discussions remarked that every Member State was keen on having its own project. A Commission official from DG JLS rather cynically commented that the *ad-hoc* centres were mostly concerned with the design of their logo. See also the anonymous Commission official quoted in Neal, A., 'Securitization and Risk at the EU Border: The Origins of FRONTEX' 47 *JCMS* 2 (2009), 342.
[247] COM(2003) 323 final, Commission Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, , 7-8.
[248] Results of the JHA Council, Luxembourg 5-6 June 2003 (Council document 9845/03). The political role of SCIFA was underlined also by the Finnish Presidency of 2006, envisaging SCIFA to take the lead in the implementation of integrated Border Management. Presidency Note for the Informal JHA Ministerial Meeting, Tampere, 20-22 September 2006, 2.

enhance operational cooperation for the management of the external borders.[249] The Commission seized the opportunity and proposed the creation of a "European Border Agency" in November 2003.[250] Twelve months later, the Council adopted Regulation (EC) No 2004/2007 establishing Frontex on the basis of Articles 62(2)(a) and 66 EC.[251] The Agency has been operational since October 2005 from its headquarters in Warsaw, Poland.[252]

The Frontex Regulation constitutes a development of that part of the Schengen *acquis* in which the UK and Ireland do not participate and consequently they have been excluded from participation in the Agency.[253] In relation to the SAC it constitutes a development of the rules on the crossing of the external borders as covered by Article 1(a) of Council Decision 1999/437/EC.[254] The participation of the SAC is foreseen in Article 21(3) of the Frontex Regulation.

The content of the Frontex Regulation, and the RABIT Regulation amending it, will be examined in detail in the next chapter. What is important for the purpose of this chapter is to point out that the Frontex Regulation for the first time provided the operational cooperation for the management of the external borders with a basis in secondary Community legislation. Although the management of the external borders had already become a Community competence with the Treaty of Amsterdam, it was only with the advent of Frontex that implementation of this policy lost most of its intergovernmental character. In particular, the Commission has increased its importance in this policy area, due to its influence within the agency.[255] It should however be noted that the emphasis is on assistance to the Member States rather than the Commission or the Council, which bears witness to the enduring intergovernmental character of this cooperation.

While the Commission more generally seems to be taking over SCIFA's role of mapping out a general strategy for the integrated management of the external borders, the

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[249] European Council Conclusions, Thessaloniki, 19-20 June 2003, points 12 and 14.
[250] COM(2003) 687 final.
[251] Council Regulation (EC) No 2007/2004, *supra* note 90, as amended by Regulation (EC) No 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ* 2007, L199/30 (hereinafter: "RABIT Regulation").
[252] Council Decision 2005/385/EC designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2005, L114/13.
[253] Case C-77/05, *supra* note 56.
[254] Council Decision 1999/437/EC on certain arrangements for the application of the Agreement concluded by the Council of the EU and Iceland and Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, *OJ* 1999, L176/31. This decision applies by analogy to Switzerland.
[255] See Busuioc, E., "Autonomy, accountability and control - the case of European agencies (Paper presented at the 4th ECPR General Conference, Pisa, 5-8 September 2007), 17-18.

Council continues to be responsible for the evaluation of the implementation of the Schengen *acquis*.[256] In respect of the competences falling under Title IV EC, including the management of the external borders, this can be considered a remnant of the intergovernmental origins of the Schengen cooperation. Logically, the Commission as guardian of the Treaties, would be the Institution that should monitor compliance, rather than the Council. The Commission has already suggested that Frontex could "provide added value to these [Schengen] evaluations through its independent status, its expertise on external border control and surveillance and its activities on training and risk analysis."[257]

4. Operational Cooperation

This section will focus on the nature of operational cooperation in the AFSJ. It will examine why operational cooperation has been so important for the development of the AFSJ and why this is likely to continue to be the case in the field of external borders management. It will also point out why operational coordination as a substitute for legislative action may be problematic in terms of legitimacy and accountability.

A "common corpus of legislation" was only one of a number of elements which the Commission identified in its 2002 Communication as central to a policy for the management of external borders. The other components were of a much more practical nature and included the establishment of common co-ordination and operational co-operation mechanisms, common integrated risk analysis and the training of staff in a European dimension.[258] Indeed the Council's Action Plan for the Management of the External Borders and the implementation thereof, were characterized by the "absolute prominence of the operational dimension."[259]

In the previous chapter it was suggested that the Commission's considering that the lifting of checks at the internal borders could be established on the basis of a limited

[256] See for instance the Commission Communication on the Reinforcing the Southern Maritime Borders, (COM(2006) 733 final) or the Commission's "Border Package" of February 2008 (COM(2008) 67-69 final); The Schengen Evaluation Committee was set up by the Decision of the Schengen Executive Committee, SCH/ Com-ex (98) 26 def. Its tasks of assessing whether acceding countries fulfil all conditions for the lifting of checks at the internal borders and ensuring the correct application of the Schengen *acquis* by Member States has been taken over by a Council Working Party.

[257] COM(2008) 67 final, Commission Report on the evaluation and future development of the FRONTEX Agency, 9, see Chapter IX.

[258] COM(2002) 233, *supra* note 49, 12.

[259] Pastore, F., 'Visa, Borders, Immigration: Formation, Structure and Current Evolution of the EU Entry Control System', in Walker, N. (Ed.), *Europe's Area of Freedom, Security and Justice* (Oxford, OUP, 2004), 124.

programme of flanking measures, forms part of the explanation for the focus that is had on the external borders. The Commission's 1988 Communication also tells us something about the nature of these flanking measures. The Commission, in relation to the question of the level at which action should be taken, stated that it was:

> "fully aware of the delicate nature and exercise of this kind, and it considers thatattention should be focused on practical effectiveness rather than on matters of legal doctrine. Therefore (…) the Commission proposes that Community legislation in this field be applied only to those cases where the legal security and uniformity provided by Community law constitutes the best instrument to achieve the desired goal."[260]

This means that all other action was to be left to intergovernmental cooperation. Of course the approach advocated here can be explained by the lack of competence at the time to proceed with Community legislation. At the same time, however, it underlines the importance of Member States' sovereignty concerns and the emphasis on "practical effectiveness" in response thereto. The Communication continues to state that there would be a "large scope left to cooperation among Member States." That this cooperation took place more on the basis of *ad hoc* informal contacts between administrations, rather than within an international treaty framework is evidenced by the host of informal, secretive bodies that developed in the field of JHA from the mid-1980s.[261]

The Schengen cooperation formed an exception to the extent that it was based on a legal framework, albeit an intergovernmental one. However, as Guiraudon has pointed out this framework was never meant to create a "constraining set of rules with monitoring mechanisms", but much rather to escape such legal control and constraints at the national level.[262] In respect of the communitarised parts of the AFSJ, this was remedied by the Treaty of Amsterdam, and to a lesser extent in respect of the parts that were brought under Title VI EU. Nevertheless, Walker has rightly noted that Member States' sovereignty concerns are likely to be triggered more by "familiar and more symbolically loaded legislation centred indices of national authority", than by other forms of policy cooperation.[263] The history of the

[260] COM(88) 640, Commission Communication on the abolition of controls of persons at intra-Community borders, 6-7.
[261] See Lavenex, S. and Wallace, W., 'Justice and Home Affairs: Towards a 'European Public Order'?', in: Wallace, H. et al. (eds), *Policy Making in the European Union* (Oxford, OUP, 2005), 459.
[262] Guiraudon, V., 'The EU "garbage can": Accounting for policy developments in the immigration domain' (Paper presented at the 2001 Conference of the European Community Studies Association, Madison, 29 May-1 June 2001), 13.
[263] Walker, N., *supra* note 2, 22.

development of Frontex, and the continuing resistance of some Member States to a more centralised model of border agency, shows that this remains the case under Title IV EC.[264]

Fostering European integration in the AFSJ by focusing on the "merely technical" cooperation between Member States' competent authorities fails to acknowledge the highly political and value-laden nature of the competences that are grouped in this policy field. Or more correctly, it acknowledges this highly political nature by masking it as non-political. Of course, as Schmitt has argued, "any decision about whether something is *unpolitical* is always a *political* decision".[265] However, the coordination of operational cooperation in the AFSJ should not be allowed to substitute policy and lawmaking processes as defined in the EU Treaties and according to which the future direction of the European project in a given area normally would be determined.

It would be moreover be incorrect to consider the coordination of operational cooperation itself as a value-neutral or merely "technical" exercise. Steinberger has rightly argued that it is "all too easy to eliminate discourse by reference to the "expert-character" of the problems involved."[266] The Council itself has noted that intelligence-led law enforcement includes the setting of political priorities.[267] The question of the extent to which this should be the task of unaccountable working groups or non-majoritarian bodies is an important one. Since operational coordination does not entail the taking of legally binding acts, it escapes not only democratic, but also judicial scrutiny. The more general concern that regulatory agencies "might stray into areas more properly the domain of the policy-making branches of the EU" is equally, if not more valid, in relation to those agencies that have the task of coordinating operational activity.[268]

Lastly, Member States may fail to appreciate the extent to which operational cooperation may "penetrate national systems and challenge statist prerogatives."[269] This may relate to both the organisation of Member States' law enforcement agencies, as well as the way in which they operate. In the field of the management of the external borders clear examples of both can be found in the Commission Communication on the setting up of a

[264] These sensitivities may be particularly strong for some of the EU10 Member States, who only regained their full national sovereignty at the end of the Cold War: Monar, J., *supra* note 55, 197.
[265] Schmitt, C., *Political Theology: four chapters on the concept of sovereignty* (Chicago, The University of Chicago Press, 1985), 2.
[266] Steinberg, P., 'Agencies, Co-Regulation and Comitology: and what about politics ?' (New York, Jean Monnet Working Paper No.6/01, 2001), 17.
[267] Council Document 9596/1/06 REV 1, 3.
[268] COM(2008) 135, *supra* note 28, 6.
[269] Walker, *supra* note 2, 22.

European Border Surveillance System (EUROSUR). First, it "invites" Member States to set up "one-single co-ordination centre".[270] Second, it refers to the establishment of a group of experts that should elaborate guidelines for the tasks of and the cooperation between these national coordination centres.[271]

The Court has never explicitly recognised a principle of institutional autonomy as such, but it has held in relation to the Member States' implementing powers that in the absence of Community legislation it is up to each state's constitutional system how these powers are exercised and to which specific national bodies they are entrusted.[272] One may wonder if Community legislation could fully pre-empt Member States' powers. Article 4(2) TEU states that the Union shall respect Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. and safeguarding national security. This seems to suggest that the institutional autonomy of the Member States constitutes a more fundamental value.[273] An example of how this may translate in legislation can be found in the EBF. The Decision allows Member States to designate several certifying and audit authorities or delegated authorities for the implementation of the money provided by the fund, on the condition there is "a clear allocation of functions for each of these authorities."[274] While it seems nevertheless obvious that legislation can at least limit Member States' institutional autonomy, the question is to what extent operational cooperation should be allowed to do the same.[275]

One of the characteristics of the different forms of operational coordination that have emerged under the AFSJ is that these originate in practical cooperation arrangements between the law enforcement agencies of a number of individual Member States. Monar has argued that these "common, rather informal structures, play an important role as points of encounter

[270] Currently, about 50 authorities from over 30 institutions have responsibilities in the surveillance of the southern external maritime borders. COM(2008) 68 final, Commission Communication examining the creation of a European Border Surveillance System (EUROSUR), 6.
[271] *Ibid*, 7.
[272] Joined Cases 51-54/71, *International Fruit Company* [1971] ECR 1107, para. 4.,
[273] See Le Barbier-Le Bris who discusses the institutional autonomy of the Member States as a principle of Community law. She argues, with reference to the equivalent to this article in the Constitutional Treaty that Community legislation could not result in the principle becoming fully devoid of its content: 'Les Principes d'autonomie institutionelle et procédurale et de coopération loyale. Les Etats membres de l'Union européenne, des Etats pas comme les autres, in : *Le Droit de l'Union en principes : Liber Amicorum en l'honneur de Jean Raux* (Rennes, Editions Apogée, 2006), 451-452
[274] Recital 25, Decision No 574/2007/EC, *supra* note 64. See also Articles 12 and 27 of the Decision.
[275] In addition to the more principled argument made above in relation to the nature of competences in the AFSJ, further arguments can be made similar to those advanced by Hatzopoulos in relation to the Open Method of Coordination: 'Why the Open Method of Coordination Is Bad For You: A Letter to the EU', 13 *ELJ* 3 (2007), 316 ff. See also the European Parliament Resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments (P6_TA(2007)0366).

and information exchange between officials from different Member States, especially after enlargement."[276]

It would seem logical to assume that legislation on operational cooperation forms the codification of bottom-up developments. Very often however, on-the-ground cooperation originates in and is coordinated by Council working groups, which consist of senior law enforcement staff of the Member States.[277] Curtin has in this respect highlighted the evolving autonomous executive role of the Council and other non-majoritarian bodies alongside the Commission.[278] At the same time, in the area of the management of the external borders, there is an increasingly important role for the Commission as policy initiator and for Frontex as coordinator of operational activities. JHA agencies have recently emphasised the importance of being heard in the legislative process.[279] This would ensure that where amendments are made to their structure or tasks, account is taken of their specific needs and experience. Although agencies are of course important stakeholders in the legislative process, care should be had that they are not allowed to dictate it, thereby setting their own rules and potentially pursuing their own interest rather than the general interest.

Operational cooperation is generally given a legal basis once a certain level of trust has been achieved and there is the need to remedy the shortcomings of a more intergovernmental approach, linked to concerns of transparency and accountability, but also compliance and coordination. Frontex forms a case in point in this respect. The Council in its more recent Draft Conclusions on the principle of convergence and the architecture for internal security, seems to show for the first time a greater sensitivity to the need for a legislative dimension to operational cooperation in JHA. It not only calls for closer cooperation between personnel and the harmonization of equipment and practice, but also for the harmonization of legal frameworks, including the establishment of common legislative instruments "where these represent added value for the Member States."[280] In the case of EUROSUR however, future legislation is likely to confirm rather than shape its development, considering the important steps have already been taken under the heading of operational coordination. This is to be

[276] Monar, J., 'Justice and Home Affairs after the 2004 Enlargement', 38 *International Spectator* 1 (2003), 16.
[277] See Aden, H., 'Administrative Governance in the field of EU Police and Judicial Cooperation,' in: Hofmann, H. and Türk, A. (Eds), *EU Administrative Governance* (Cheltenham, Edward Elgar, 2006), 351. This is true as much for the Third Pillar, as it is for the field of external borders management under the First.
[278] Curtin, D., 'European Union Executive Actors Evolving in the Shade?', in: De Zwaan, J., *et al*. (Eds), *The European Union: an ongoing Process of Integration, Liber Amicorum A. Kellerman* (The Hague, T.M.C. Asser Press, 2004), 99-101.
[279] Council Document 11644/08, 2.
[280] Council Document 13459/08, 3-4.

regretted, since projects of such importance, and financially so, deserve a proper legislative *iter* guaranteeing accountability and legitimacy.

It should be recalled that even where legislation is adopted for the purpose of regulating operational cooperation, this does not detract from the intrinsically operational nature of law enforcement tasks themselves. The law can only provide the legal basis for enforcement powers and a framework for their exercise, providing for appropriate checks and balances. The use of these powers however will always take place in unique situations. For this reason alone the operational dimension of the AFSJ will remain a prominent feature under Title IV EC, in any case where the management of the external borders is concerned.

Operational cooperation in the AFSJ has the specific characteristic that it focuses on compliance with national rules and regulations, rather than Community legislation. This is in particular so under the Third Pillar. However, even when operational cooperation is aimed at ensuring compliance with Community legislation, such as the SBC, it does not of itself create rights and obligations for third parties. An example here is a joint patrol carrying out border surveillance in the context of a Frontex joint operation, attempting to prevent irregular border crossings.

It should be stressed that in the AFSJ neither the Commission staff, nor the staff of any of the agencies, be it under the First or Third Pillar, is endowed with autonomous law enforcement powers, let alone powers of coercion. In reality, operational activity at the EU level is therefore limited to the *coordination* of operational activities of national law enforcement agencies by EU bodies and institutions. Article 66 EC clearly refers to the cooperation in the areas covered by Title IV EC as *between* the relevant departments of the administrations of the Member States. Likewise, Article 30(1)(a) EU provides that police cooperation shall include operational cooperation *between* competent authorities. The coordination at EU level also does not replace bi- or multi-lateral initiatives between Member States themselves. This is underlined in the Frontex Regulation in Article 2(2), as well as in Article 16(3) of the SBC. The Lisbon Treaty would include a provision to this effect in Article 73 TFEU.

In line with Article 230 EC, the Court can only review the legality of measures intended to produce legal effects vis-à-vis third parties.[281] In relation to acts brought by

[281] The Court has consistently held that "an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects": Case 22/70, *Commission v Council* [1971] ECR 263, para. 42, Case C-57/59, *France v. Commission* [1997] ECR I-1627, para. 7.

individuals it has long held that "only measures, the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an application for annulment."[282] The fact that the coordination of operational activities does not entail the taking of such measures means that these activities escape review by the EJC.[283] The extension of the Court's jurisdiction in the Lisbon Treaty to review the acts of bodies, offices and agencies of the Union would not change this.[284] The Court has however held in a case relating to the adoption of non-binding guidelines by the Commission, that the fact that a measure is non-binding is not sufficient to confer on an Institution the competence to adopt it and that account must still be had of the division of powers and institutional balances as laid down in the Treaties.[285]

Moreover, the non-binding nature of operational activities vis-à-vis third parties does not mean that in the course of such activities rights and obligations cannot arise. For instance, if during a joint patrol a police officer arrests a suspected criminal or a border guard denies a third country national access to EU territory this of course has effects in law. In the first case however, the decision is taken on the basis of national law. In the second case, it is taken on the basis of the SBC, but by law enforcement personnel endowed with public authority on the basis of national law.[286] Here it should however be noted that border guards from one Member State that participate in joint operations/the deployment of a Rapid Border Intervention Team in another Member State may use force in accordance with the rules and regulations of the guest Member State.[287]

Importantly, operational activity could constitute a tort or criminal offence under Member States' domestic law. Here one could think of the (accidental) sinking of migrant boats or the shooting of irregular border crossers. This possibility is recognised in the RABIT Regulation which for the purpose of civil and criminal liability equates visiting border guards with national border guards.[288] A wrongful act that would be directly imputable to the

[282] Case 60/81, *IBM v. Commission* [1981] ECR 2639, para. 9.
[283] Cf. with the preparatory work done by the European Medicines Agency (EMEA), an EC body in the field of pharmaceuticals regulation: Case T-326/99, *Fern Olivieri v. Commission and EMEA* [2003] ECR II-6053, para. 53.
[284] Article 263 TFEU. A possible exception would be that a Member State could in theory challenge an operational plan which establish the *modus operandi* for joint operation as a decision. The Treaty amendment aimed however to provide a legal basis to the possibility for appeal against decisions made by regulatory agencies with decision-making powers (such as for instance the Office for Harmonisation in the Internal Market - Trademarks and designs).
[285] Case C-233/02, *France v. Commission* [2002] ECR I-2759, para. 40.
[286] Under Article 13(2), SBC and Article 10(10), Frontex Regulation, only national border guards can take the decision to refuse entry.
[287] Article 10(6), Frontex Regulation and Article 6(6), RABIT Regulation.
[288] Articles 10b and 10c, Frontex Regulation and Articles 10 and 11, RABIT Regulation.

coordinating activities of the EU could result in non-contractual liability of the EU on the basis of Article 288(2) EC. This non-contractual liability extends beyond the institutions to other Community bodies established by the treaties. Community legislation often specifically provides for non-contractual liability in similar terms as those of Article 288(2) EC, for instance in the founding regulations of many EC agencies.[289]

Under the International Principles of State Liability the Member States could be held responsible for fatalities that are a direct result of specific border control measures.[290] A parallel responsibility of the EU, under the Principles of the Responsibility of International Organisations, could be assumed where these measures are a direct result of the EU's coordinating activities.[291] Member States could furthermore be held responsible for violations of human rights in the course of operational activity under the European Convention on Human Rights.

The approach taken above with regard to the possible responsibility of the EU for its coordinating activity is of course highly theoretical. For instance, in the case of wrongdoings by Member States' border guards in the course of Frontex coordinated operational activity, it would be very difficult to actually attribute responsibility to the EU. Yet, it may be argued that whenever the EU acts as coordinator of operational activity, it has a positive obligation to ensure that all participating Member States fully respect fundamental rights, such as the right to life. This is all the more so, bearing in mind that respect for these rights is one of the Union's foundational values listed in Article 6 EU, one of the Copenhagen criteria for accession and a condition in its external relation with third countries.[292] Without jurisdiction of the ECJ the affirmation in recital 22 of the Frontex Regulation that it respects fundamental rights become empty words.

One could argue that the ECJ should have the right to review Member States operational activity during joint operations for compatibility with fundamental rights. Of course the limitation of jurisdiction in Article 68(2) EC and Article 35(5) EU could be used as an argument against the Court exercising jurisdiction over the operations of Member States' border guards, leaving this review to the national courts of the Member States, with a possibility of appeal to the ECtHR.

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[289] See for instance Article 19(3), Frontex Regulation.

[290] Spijkerboer, T., 'The Human Cost of Border Control', 9 *EJML* 1(2007), 137. ILC Draft Articles on Responsibility of States for internationally wrongful acts, ICL Report of 53rd Session, A/56/10, 2001, Chap. IV.

[291] ILC Draft Articles on international responsibility of international organisations, ILC Report of 56th Session, A/59/10, 2004, Chap. V.

[292] As evidenced by the systematic inclusion since 1992 of a clause in its agreements with third countries, defining respect for democratic principles and human rights clause as an "essential element."

However, if one applies by analogy the Court's established case law in relation to Member States' national rules to Member States' operational activities, these would have to be compatible with fundamental rights as an obligation of Community law as soon as they fall within the scope of Community law, which for the management of the external borders would be obvious.[293] On a more cautious approach one could argue that the Court should assume jurisdiction when there are indications of "serious and persistent violations, which highlight a problem of a systematic nature in the protection of fundamental rights in the Member States," since this could effectively undermine not only the Community rules on the crossing of the external borders, but also free movement rights more generally.[294]

5. The Exercise of Implementing Powers

The above discussion of operational cooperation for the management of the external borders shows that the coordination thereof is gradually losing its intergovernmental traits. In this section we will see to what extent the same can be said for the exercise of implementing powers under Title IV EC. In many of the legal instruments discussed above, the Commission has been endowed with implementation powers to be exercised under the supervision of the comitology procedure. Even in the case of some Third Pillar measures, "comitology-like" provisions have been included, which could be regarded as a move towards the application of Community practices under the Third Pillar.[295] The Schengen/Dublin Associated Countries have all been associated with the Commission's work in implementing the Schengen *acquis*/Dublin rules.[296] They have however the status of observer, which means they have the right to speak, but not vote. Although most decision making in committees is by consensus, it does show that the partial participation of the SAC amounts to some extent to unequal participation.[297]

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[293] Case C-260/89, *ERT* [1989] ECR-I 2925, para. 42.
[294] Opinion of AG Poiares Maduro in Case C-380/05, *Centro Europa 7* [2008] ECR I-349, delivered on 12 September 2007, para. 22.
[295] As was the case for the SIS II Decision, see Article 67 and the reference to that article in Decision 2007/533/JHA, *supra* note 107.
[296] See the Agreement in the form of Exchanges of Letters between the Council of the EU and Iceland and Norway concerning committees which assist the European Commission in the exercise of its executive powers, *OJ* 1999, L176/53. In the case of Switzerland separate Exchanges of Letters have been attached to the agreement on its association with the Schengen *acquis*, as well as the Dublin Regulation and EURODAC.
[297] Malterud, T., 'The Challenge of Being an "Active Observer" Some Experiences from Norway' *Eipascope* 2 (2003), 22.

On a number of occasions, the Council has been reluctant to delegate implementing powers to the Commission, reserving the right to exercise implementing powers to itself, for instance in relation to the EURODAC Regulation.[298] In Case C-257/01, the Commission contested two Regulations in which the Council had reserved the right to exercise implementing powers both to itself, as well as to the Member States.[299] The first Regulation concerned the right to amend certain provisions and practical procedures for the examination of visa applications in the Common Consular Instructions (CCI).[300] The second Regulation, predating the adoption of the SBC, concerned the power to amend detailed provisions and practical procedures for carrying out border checks and surveillance of the Common Manual.[301] The Regulations established two procedures. Under Article 1 of the Regulations, the Council could amend certain procedures unanimously.[302] Under Article 2, the Member States could communicate amendments to the annexes to the CCI and the Common Manual to the Secretary-General of the Council, who would then inform the Council and the Commission.

In its judgment in Case 16/88, the Court had already held that the Council must state in detail the reasons for a decision to retain implementing powers.[303] In paragraph 51 of Case C-257/01, the Court added that "the Council must properly explain, by reference to the nature and content of the basic instrument to be implemented, why exception is being made to the rule (…)." In both Regulations, the Council had in identical terms, referred to the enhanced role of the Member States in these areas and the sensitivity thereof. Advocate General Léger in his opinion to the case argued that the requirement of specificity prevented the Council from reserving implementing powers in an entire field, for an unlimited time and that it had failed to establish the specificity of the situation in which the implementing powers were to be reserved.[304] The Court qualified the Council's reasoning as "general and laconic", but nevertheless accepted it, when "assessed in its proper context".[305]

The ECJ put forward two arguments. First, it recalled that before the Treaty of Amsterdam the aspects of visa policy in question, as well as external border policy fell under

[298] Article 22, EURODAC Regulation.
[299] Case C-257/01, *Commission v. Council* [2005] ECR I-345.
[300] Council Regulation (EC) No 789/2001, *OJ* 2001, L116/2.
[301] Council Regulation (EC) No 790/2001, *OJ* 2001, L116/5.
[302] This was amended to qualified majority by Article 3 of Council Decision 2004/927/EC providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, *OJ* 2004, L 396/45.
[303] Case 16/88, *supra* note 13, para. 10.
[304] Opinion of AG Léger in Case C-257/01, delivered on 27 April 2004, paras. 46-47 and 70.
[305] Case C-257/01, *supra* note 299, para. 53.

Title VI EU.[306] Although this may serve to underline the sensitivity of the subject areas, it ignores the fact that the Member States in Amsterdam made a conscious choice to transfer these matters to the First Pillar. Second, the Court refers to the transitional period foreseen in the Treaty of Amsterdam. This argument has more force for it underlines the continuing sensitivity of the matter *after* the entry into force of the Amsterdam Treaty, which could justify the retention of implementing powers by the Council for, at least, the duration of the transitional period.[307]

As regards the possibility for Member States to unilaterally make amendments to the annexes of the CCI and Common Manual, the Court noted that these instruments were adopted by the Schengen Executive Committee as part of intergovernmental cooperation. Their integration into the framework of the EU did not, of itself, mean that Member States would lose the powers which they were entitled to exercise under those instruments in order to ensure their proper implementation.[308] This reasoning shows the need to recast these instruments as Community measures, at which point the Member States could presumably be "stripped", in the Court's words, of these powers. The ECJ's further held that the information subject to amendment by the Member States was factual and could only provided effectively by the Member States, as only they possessed this information. Since the Commission had not argued that there was the need for a uniform updating procedure in order to ensure proper implementation, this could be considered simply a form of implementation by the Member States.

The SBC has now substituted both the Common Manual and the contested Regulation on the amendment of the Common Manual. It confers all implementing powers on the Commission subject to the regulatory comitology procedure.[309] The Regulation regarding visa policy remains however in force and leaves all implementing powers to the Council and the Member States.

In case C-133/06 the Court was asked to pronounce itself once more on a provision which reserved certain decision making powers to the Council.[310] Although the case did not relate to a measure concerning the external borders, it did concern a regulation adopted under Title IV, namely the so-called Asylum Procedures Directive.[311] Article 29(1) and (2) of the

[306] *Ibid.*, para. 54.
[307] *Ibid.*, para. 55.
[308] *Ibid.*, para. 54.
[309] Article 33(2) and the references made to that Article, SBC.
[310] Case C-133/06, *European Parliament v. Council* [2006] ECR-I 3189.
[311] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* 2005, L326/13.

Directive provided that the Council, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, was to adopt a minimum common list of so-called safe third countries, for the purpose of the assessment of an asylum request. It could then amend this list by qualified majority on a proposal from the Commission and after consultation of the European Parliament.

The Directive was adopted on the basis of Article 63(1)(d) EC which is not covered by the co-decision procedure, but by consultation. However Article 67(5) EC stated that after the transitional period measures provided for in Article 63(1) and (2)(a) EC would be covered by co-decision, provided that the Council had previously adopted Community legislation defining the common rules and basic principles governing these issues. The Commission and the Parliament argued that with the adoption of the Directive it had done exactly that, and that therefore the adoption of the safe third country list and its amendment should be covered by the co-decision procedure.[312]

The Court first of all examined whether, on the assumption that the establishment and amendment of the list are "non-essential and relate to a specific case," the Court could have reserved implementing powers to itself.[313] The Council, in recital 19 had referred to the political importance of the designation of safe countries of origin and in recital 24 the potential consequences of the safe third country concept for asylum applicants. The Court agreed with the AG that this would justify consultation of the Parliament but that it did not justify sufficiently a reservation of implementing powers to the Council.[314] Moreover, the Council had not advanced any argument to the effect that in its view this actually constituted the retention of implementing powers.[315]

The Court concluded that Articles 29(1) and (2) of the Directive amounted to the creation of secondary legal bases, which would grant the Council a legislative power it was not given in the Treaties and which would upset the institutional balance.[316] It held that their inclusion amounted to an infringement of Article 67 EC.[317] In order to avoid any doubt, the Court continued by specifying that for the purpose of any future decision the Directive was

[312] Case C-133/06, *supra* note 310, paras. 21 and 30.
[313] In fact the AG had argued in favour of a categorisation of the articles as implementing measures: Opinion AG Poiares Maduro in Case C-133/06, delivered on 27 September 2007, paras. 18-19.
[314] Case C-133/06, *supra* note 310, para. 49.
[315] *Ibid.*, para. 50.
[316] *Ibid.*, paras. 56-58.
[317] *Ibid*., para. 61.

indeed to be regarded as laying down common rules and basic principles.[318] Consequently, the co-decision procedure should apply.[319]

While the five-year transitional period provided in by the Treaty of Amsterdam allowed the Commission and European Parliament to develop a practice of cooperation with the Council, it may be concluded from the cases discussed above that after the expiry of this period, the Court is no longer willing to accept too readily a retention by the Council of implementing powers.[320] Title IV EC can therefore be considered to have become fully communitarised also in respect of the exercise of implementing powers. In view of the politically sensitive nature of the area, the Council may still want to retain implementing powers more frequently. However, this will no longer be able to serve as a sufficiently specific justification and the Court will scrutinize any other reasons put forward by the Council.

6. The Commission's 2008 Border Package: Brave New Border?

The work on the development of the integrated management of the EU borders continues, both in legislative as operational terms. In February 2008 the Commission tabled three Communications which together were labelled "the EU Border Package". The first communication evaluates Frontex and considers options for its future development, the second is titled "Preparing the next steps in border management in the European Union," the third examines the setting up of a European Surveillance System (EUROSUR).[321] In chapter VI we already discussed the possible effects on the border crossing regime at the Schengen external borders, if the ideas put forward by the Commission in its Communication on the Next Steps for the Management of the External Borders were to be translated into legislation.[322] Here we shall focus on the Communication on EUROSUR and the proposed introduction of an entry-exit system.[323] These proposals evidence once more an almost unchecked faith in the capabilities of technology in sealing off the external borders of the Schengen area. Although these Communications certainly form part of the continuous evaluation of and thinking on the future development of policies in the area of JHA, they are

[318] *Ibid*., para. 62-63.
[319] *Ibid*., para. 66.
[320] Stetter, S., 'Regulating migration: authority delegation in justice and home affairs', 7 *JEPP* 1 (2000), 96.
[321] COM(2008) 67 final, Commission Communication, 'Report on the evaluation and future development of the FRONTEX Agency'; COM(2008) 68 final, *supra* note 270; COM(2008) 69 final, Commission Communication, 'Preparing the next steps in border management in the European Union'.
[322] COM(2008) 69 final, *ibid*.
[323] The Communication on the future development of Frontex will be discussed in the next chapter.

not as such placed within a wider system for evaluation of policies in the AFSJ, as had been proposed on earlier occasions.[324]

EUROSUR

The Communication on EUROSUR sets out a time path for the establishment of European border surveillance system that would establish synergies between the Member States' electronic and physical surveillance of the external borders. Although it would cover both maritime borders and land borders, it seems safe to assume that the main motivation behind the idea of creating this system lies in the continuing irregular migration across the southern external maritime borders.[325] In 2003 a study carried out at the request of the JHA Council had already called for an extension of SIVE-type systems and "intranet networks to coordinate the exchange of information (..) between the organisations involved."[326] The European Council of 14-15 December 2006 urged that as a matter of priority "the creation of a European Surveillance System for the Management of the southern maritime borders" would be examined.[327]

EUROSUR's objectives are threefold: to reduce irregular migration, prevent cross-border crime and enhance search and rescue capabilities at sea.[328] The first two objectives confirm the importance that is attached to borders as a means of fighting irregular migration and cross-border crime. In the previous chapter we have already put some questions marks to this idea. Also the latter objective is disputable. The sealing off of stretches of the Mediterranean and Atlantic Coast has had deadly displacement effects in the past, forcing migrants to use more dangerous routes. The Communication completely ignores this point. It also ignores the question of what would happen were a vessel with potential irregular migrants to be detected by the system, as well as the question of what the consequences may be for people in need of international protection.[329]

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[324] COM(2006) 332 final, Commission Communication on the Evaluation of EU Policies on Freedom, Security and Justice.
[325] See COM(2006) 733 final, *supra* note 256, 8.
[326] 'Feasibility study on the control of the European Union's maritime borders' (Civipol Conseil, Paris, 4 July 2003), Council Document 11490/1/03, 76.
[327] European Council Conclusions, Brussels, 14-15 December 2006, point 24(b).
[328] COM(2008) 68, *supra* note 270, 3-4.
[329] We will return to this point in Chapter XI. Jeandesboz fiercely criticises the Commission Communications on EUROSUR and FRONTEX for a lack of attention paid to these questions: Jeandesboz, J., 'Reinforcing the Surveillance of EU Borders The Future Development of FRONTEX and EUROSUR' (Brussels, Challenge Research Paper No 11, August 2008), 18.

Frontex has already been setting up a so-called European Patrol Network, coordinating Member States patrolling activities in the Mediterranean in order to prevent overlap and increase cost-efficiency. It has moreover started work on an organisational structure, establishing National Coordination Centres which eventually would be integrated in EUROSUR. This work is based on Frontex' MEDSEA study on the feasibility of a Mediterranean Coastal Patrols Network.[330] A further study, BORTEC, explored the technical feasibility of establishing a surveillance system.[331]

EUROSUR would be established in three phases. The first phase would consist of the interlinking and streamlining of national surveillance systems. It would include the establishment of a secured computerised communication network between the national coordination centres and Frontex, as well as the support to third countries in the setting up of their own border surveillance infrastructure. Phase two almost exclusively focuses on the improvement and development of surveillance tools and sensors such as earth observation satellites and unmanned aerial vehicles, confirming the present-day "fortification, militarization and informatization" of borders also in the European Union.[332]

The Commission was expected to report to the Council in Spring 2009 and "assess the need for a legislative initiative" with regard the progress made on guidelines for national coordination centres.[333] It would further make a proposal for the system architecture for the communication network. The fact is however that, at least at the southern maritime external borders, much of the groundwork on the EUROSUR is already taking place within the framework of the EPN, i.e. under the heading of operational cooperation. Also the impact assessment accompanying the communication considered that phase 1 and 2 could be largely implemented within the existing legislative framework and based to a large extent on actions already under preparation.[334]

The Communication almost reassuringly states that EUROSUR would be set up "without affecting the respective areas of jurisdiction, nor replace existing systems".[335] It further emphasises the "key operational objective to use information collected by different

[330] Council Document 12049/06 (partly accessible).
[331] Frontex, Study on technical feasibility of establishing a surveillance system (European Surveillance System), 12 January 2007. Not public, not listed in the Council's register of documents.
[332] Van der Ploeg, I., 'Borderline identities: the enrolment of bodies in the technological reconstruction of borders', in: Monaham, T. (Ed.), *Surveillance and Security: technological politics and power in everyday life* (New York, Routledge, 2006), 178.
[333] COM(2008) 68 final, *supra* note 270, 7. At the time of writing it had not yet done so.
[334] SEC(2008) 151, Commission Staff Working Document, Accompanying Document to COM(2008) 68 final, Impact Assessment, 19 and 57.
[335] COM(2008) 68 final, *supra* note 270, 4.

systems in a more coherent manner."[336] However, as we noted earlier in this chapter, the practical effects of "mere" operational cooperation on national systems may be considerable. The Commission makes one further and general reference to the need for legislative measures at the end of the communication where it considers that EU data protection laws would require the processing of personal data within the context of EUROSUR to be based upon "appropriate legislative measures."[337]

The third phase of EUROSUR would focus exclusively on the maritime borders, creating a common information sharing environment between responsible authorities.[338] EUROSUR would form part of a broader overarching information system integrating all European maritime reporting and surveillance systems, covering all maritime activities from maritime safety to border surveillance.[339] It becomes clear however that that EUROSUR will initially develop separately, focussing solely on border surveillance in a limited number of areas characterised by high migratory pressure, namely the Mediterranean, the southern Atlantic Ocean (Canary Islands) and the Black Sea.[340]

It is difficult to establish the necessity and proportionality of the EUROSUR system. Since the MEDSEA study is only partly accessible to the public and the BORTEC study remains secret, it is difficult for anyone without access to these documents to give a reasoned opinion on the costs and feasibility of the system. A few critical remarks however need to be made. First, borders may only have limited value as instruments against irregular migration and crime. Second, there seems to be no attention for the danger of diversion effects or questions of international protection. In connection with the EU's relations with third countries, two further issues have been raised. First, one may doubt whether the EU should help build the technological surveillance capacity of countries with a less than perfect human rights record. Second, the building of electronic fences across the Mediterranean seems to contradict the policy goal of Euro-mediterranean partnerships.[341]

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[336] *Ibid*.
[337] *Ibid.*, 11.
[338] *Ibid.*, 9.
[339] COM(2007) 575 final, Commission Communication on An Integrated Maritime Policy for the European Union. Note also the development of the "SafeSeaNet" under the supervision of the European Maritime Safety Agency (EMSA). See also SEC(2008) 2737, Commission Non-Paper on Maritime Surveillance.
[340] SEC(2008) 151, *supra* note 334, refers to the expansion of the geographical scope of the EUROSUR to the Black Sea and to the eastern external land border (which is absent from the Communication) with a vague reference to migratory pressure and displacement effects, 5 and 12-13.
[341] Wolff, S., 'Border Management in the Mediterranean: internal, external and ethical challenges', 21 *Cam Rev Int'l Aff* 2 (2008), 266. Mediterranean leaders gathered on 13 July 2008 in Paris for the launch of the Union for the Mediterranean, reinforcing the so-called Barcelona Process started in 1995. We will return to the relation with third countries in Chapter X.

Entry-Exit System

Considering that overstay is one of the main sources of irregular migration, the introduction of an entry-exit systems seems at first sight a valuable means of combating irregular stay in the Schengen countries.[342] However, how far should the Commission proposal for an entry-exit system as outlined in the Communication be considered necessary and proportional for its purpose?

The system as envisaged by the Commission would cover all TCNs, also monitoring the movement of TCNs that are not under a visa obligation even if the number of those who overstay from this category is very small.[343] The entry-exit system would again require the collection of an enormous amount of biometric data. For TCNs that are not under a visa obligation and do not have registered traveler status, these data would have to be collected at the moment of border crossing. The Commission quite optimistically states that this "could potentially complicate the management of passenger flows," but that this could be offset by the better flow resulting from the use of automated gates.[344]

Although some have argued that the question regarding practical operability is one for experts rather than lawyers, technical feasibility and costs of a project should be taken into account when making an assessment of its proportionality and necessity.[345] In this respect a report of the US Accountability Office on a similar system, US-VISIT, shows that even with a much more limited number of recognized border points than in the EU and despite considerable financial investments, the registration of exit does not yet work properly.[346] Likewise large ICT projects at EU and national level have often been characterized by delays and exceeding costs.[347] It is worrying that the Commission has already proposed the system

[342] The Commission Impact Assessment accompanying COM(2006) 69 final estimates that half of the illegal immigrants have overstayed their visa: SEC(2008) 153, 6.
[343] *Ibid*., 8 and 38.
[344] COM(2006) 69, *supra* note 321, 8.
[345] Guild, E. *et al*., 'The Commission's New Border Package - Does it take us one step closer to a 'cyber-fortress Europe'? (Brussels, CEPS Policy Brief No 154, March 2008), 3.
[346] GAO, 'Homeland Security: Prospects For Biometric US-VISIT Exit Capability Remain Unclear' (Testimony before the Subcommittee on Border, Maritime and Global Counterterrorism, Committee on Homeland Security, House of Representatives, GAO-07-1044T, 28 June 2007).
[347] See with respect to the SIS II: House of Lords, *supra* note 108, 13. See also the abandoned proposal for the inclusion of biometric identifiers in visa stickers, COM(2003) 558 final, *supra* note 153. See for an example at national level the report of the Dutch Court of Auditors, which interestingly states at the outset that the "enthusiasm of policy makers" means that too often ICT solutions are seen as the magical solution to political questions, whilst they tend to overestimate the technological possibilities: Algemene Rekenkamer, 'Lessen uit ICT-projecten bij de Overheid – Deel A' (Den Haag, 29 November 2007, 15.

twice previously without engaging in thorough research beforehand.[348] Also the "EU future group" simply echoes the Commission's border package.[349]

The Council's conclusions on the entry-exit system seem slightly more careful. Available technology should be used as "a complementary" although "essential measure" to improve the management of the external borders and to combat illegal migration.[350] It emphasises that new systems should fully comply with Community law principles on data protection, human rights, international protection and proportionality, and should reflect a "cost benefit approach and added value of technology".[351] At the same time, a survey amongst Member States as regards the entry-exit system showed almost unanimous support for the system itself, as well as for the inclusion of biometric data.[352]

A highly critical approach was taken by the EDPS, whose office, to his dismay, had not been consulted on the Border Package. The EDPS pointed out that throughout the Commission Communication "some bold statements are made, that are not based on undisputable evidence."[353] The EDPS furthermore warned that the unplanned proliferation of databases in the AFSJ risks impeding a critical assessment of individual proposals, which themselves may be acceptable, yet may not be in synergy with others.[354] This point is particularly well taken if one realizes that the so-called Biometric Matching System (BMS), currently under development for the VIS, can from an "architectural and structural point of view" easily be applied to other systems.[355] The Council seems to have picked up on this point in its call for an "indicative IT Strategy for all European IT systems in the area of Justice and Home Affairs" by the end of 2009.[356]

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[348] COM(2005) 597 final, *supra* note 95, 9 and COM(2006) 402 final, Commission Communication on Policy priorities in the fight against illegal immigration of third-country nationals, 6.

[349] Report of the Informal High Level Advisory Group on the Future of European Home Affairs Policy (The Future Group), 'Freedom, Security, Privacy: European Home Affairs in an open world' (June 2008), 36. The EU future group was established by the German Presidency in 2007 and drafted recommendations for after The Hague Programme ends (2010).

[350] Draft Council Conclusions on the management of the external borders of the member states of the European Union, Luxembourg, 5-6 June 2008 (Council Document 9873/08), point 14.

[351] *Ibid*, point 15.

[352] Nineteen Member States, including the UK and Ireland (*sic*) replied to the questionnaire. The three SAC countries also replied. Only two Member States (Slovenia and Romania) opposed the taking of biometric data, Lithuania's answer was unclear and Hungary wanted the taking of biometric data only for those TCNs under a visa obligation. Greece went as far as to argue the entry-exit system should extend even to EU citizens, which would be contrary to the EU free movement rules as they stand (Council Document 13403/08).

[353] EDPS, Preliminary comments on three Communications from the Commission on border management (COM (2008) 69, COM (2008)68 and COM (2008)67) (Brussels, 3 March 2008), 3.

[354] *Ibid*.

[355] SEC(2008) 153, *supra* note 342, 19.

[356] Council Conclusions on the management of the external borders of the member states of the European Union, *supra* note 350, point 19.

The added value of the entry-exit system may be questioned for a number of reasons. It would neither be capable of identifying overstayers, nor potential terrorists or criminals, nor would it help to locate them within the Schengen area. It would merely enable authorities to know if suspected law breakers find themselves in the Schengen area, as well as where and when they entered or left, provided of course they did not cross an external border irregularly. The impact assessment notes that the entry-exit system may have a deterrent effect, but at the same time admits that it may result in overstayers deciding not to leave at all.[357] Moreover, it is not unthinkable that irregular migrants may change strategies opting for irregular entry rather than applying for a visa at all.[358]

There is a more principled reason for opposing the system, which is again pointed out by the EDPS. The entry-exit system puts all travellers under surveillance, considering them *a priori* as potential law breakers.[359] In addition, as Guild *et al.* note, the "institution of different layers of security" as the Commission puts it, will lead to a culture where border guards will second-guess the work of the visa issuing authorities and feed a culture of mistrust.[360]

Although the entry-exit system is presented as a measure for the control of the external borders, its potential as an instrument of general immigration control *within* the Schengen area of free movement is much greater. It would moreover be a small step to use the data collected as a means of identifying TCNs. From the survey carried out amongst Member States it clearly follows that the majority of Member States envisage access not only by the competent immigration authorities, but by a much wider range of law enforcement personnel.[361]

It is important to note that the system would have to be considered a Schengen developing measure, developing a part of the Schengen *acquis* in which the UK and Ireland do not participate, whether the proposal were to be framed as a visa measure or as an external borders measure. However, at least one British newspaper reported that the UK may actually join the system.[362] The only way in which this would not go squarely against the Court's case law is if the proposal were to be made on the legal basis for measures combating irregular migration. This would however mean that the system could not be integrated with the SIS, nor

[357] SEC(2008) 153, *supra* note 342, 48.
[358] See also Peers, S., 'Proposed New EU Border Control Systems' (EP Briefing Paper, June 2008, PE 408.296), 9.
[359] EDPS, *supra* note 353, 3.
[360] Guild, E. *et al*., *supra* note 345, 3.
[361] Council Document 13403/08.
[362] 'UK may join EU border security system' (*The Guardian*, 14 February 2008).

the VIS, and it would once more show the prominence of a security rationale underpinning the EU's policy in migration and border management.

The measures proposed by the Commission are likely to slow down passenger flows, rather than facilitate the movement of people across the external borders. If feasible at all, this will be done at an enormous financial cost, at the expense of travellers' privacy and in exchange for security gains that are yet to be proven. While many of the developments mirror those in the US, Europe does not seem to question their need, nor to learn from the American experience. An examination of the policy documents relating to the Communications gives the idea that the Communications indeed lay down the foundations of the EU's future border management policy and that there is broad agreement on them already.

In relation to the EUROSUR project, it is likely that future legislation will confirm rather than shape its development, considering that important steps have already been taken under the heading of operational coordination. This is to be regretted, since decisions of the scale proposed in the border package deserve a proper legislative *iter* guaranteeing accountability and legitimacy.

7. Innovations brought about by the Lisbon Treaty

In Chapter III we considered the relatively modest changes the Lisbon Treaty would bring about to the competences for the management of the external borders. Aware that the future of the Lisbon Treaty after the Irish no-vote remains uncertain, here we will consider the changes that this Treaty would bring about to executive action in the AFSJ in general and the area of external borders management in particular.

One of the major innovations of the Constitutional Treaty was the introduction of a hierarchy of acts, explicitly distinguishing for the first time between legislative and executive measures or rather "legislative and non-legislative acts". This distinction has been maintained in the Lisbon Treaty. Article 289(3) TFEU defines as legislative acts all legal acts that are adopted under legislative procedure.[363]

There are two types of non-legislative acts. First, Article 290(1) TFEU provides that the legislator can by legislative act delegate to the Commission the power to adopt non-

[363] Legislative procedure as such is not defined in the TFEU. From Articles 289(1) and (2) it follows however that it covers the adoption of a Regulation, Directive or Decision under the ordinary legislative procedure (the current co-decision, laid down in Article 290 TFEU) or special legislative procedure (limiting the role of either the Parliament or the Council to "participation", the particular modalities of which are to be found in the respective legal bases throughout the Treaty). Note that the definition of legislative acts is a formal one.

legislative acts of general application to supplement or amend certain non-essential elements of the legislative act, so called delegated acts. The objectives, content, scope and duration of the delegation must be explicitly defined in the legislative acts. The "essential elements of an area" can only be regulated by legislative act and may not be delegated. Both Parliament and the Council can veto the entry into force of a delegated act and can revoke the delegation.

Second, Article 291(1) states that Member States shall adopt all measures of national law necessary to implement legally binding Union acts. This article codifies the prime responsibility of the Member States for the implementation of EU legislation. In fact, it was argued that implementing acts would only exceptionally be adopted by the Commission, or even more exceptionally the Council.[364] It seems unlikely that as regards implementing acts, the current system of comitology would cease to exist. The current Article 202(2) EC is taken over by Article 291(2) TFEU, stating that that "where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission." It further stipulates that Union acts may in duly justified specific cases confer implementing powers on the Council, codifying the Court's case law in this respect, as well as in the cases provided for in Articles 24 and 26 EU on the Common Foreign and Security Policy.

The difference between delegated and implementing acts has been criticised as being unclear, not least because under the current interpretation of the ECJ implementation includes the updating and amending of non-essential elements of Community legislation.[365] It would therefore depend on the definition in the legislative act if a measure is a delegated act or implementing act. Ponzano explains the distinction by reference to Member States' national legal systems which differentiate between cases in which the government acts in its own field of competence (decrees, implementing acts under the Lisbon Treaty) and cases in which it acts in the field of competence of the legislator (decree-laws, delegated acts under the Lisbon Treaty).[366]

In relation to the category of delegated acts, the comitology procedure (currently the regulatory procedure with scrutiny) would be replaced by a direct oversight of the Parliament and the Council. This has been criticized by some for depriving the Commission of necessary

[364] Draft Articles 24-33 of the Constitutional Treaty, CONV 571/03, 17.
[365] Vos, E., 'European Governance and Comitology', in: Curtin, D. and Wessels, R. (Eds), *Good Governance and the European Union: Concept, implications and applications* (Intersentia, Antwerp, 2005), 117. See also Dougan, M., 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' 45 *CMLRev* 3 (2008), 649.
[366] Ponzano, P., '"Executive" and "delegated" acts: The situation after the Lisbon Treaty', in: Griller, S. and Ziller, J., *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Vienna, Springer Verlag, 2008).

expertise, as well as ignoring transnational partnership as a pre-condition for multi-level governance.[367] It can moreover be expected that the Council will try to retain control over delegated acts, in particular in the politically sensitive AFSJ. It could do so through informal control mechanisms, which by their nature would be less accountable than the already rather opaque comitology procedure. The Council could also, in the legislative process, try to define certain acts as implementing rather than delegated and reserve implementing powers to itself.

The Convention Working Group on Simplification "broached the idea" of introducing in the Constitutional Treaty the possibility of assigning decentralized agencies (or "regulatory authorities") the task of adopting certain implementing acts.[368] Neither the Constitutional Treaty, nor the Lisbon Treaty however makes reference to the execution of Union legislation by agencies, effectively ignoring an important institutional reality in the EU.

While the Convention's Working Group on Simplification examined the distinction between legislative and non-legislative acts, the Working Group on the AFSJ grappled with the question on how better to separate the legislative and operational tasks of the Council.[369] The Working Group did not however attempt to define either of the two concepts. The legislative tasks of the Council appear to have included the implementation of legislation as well.[370] This definition would seem to be based on the substantive, rather than formal criteria, namely the legal effect vis-à-vis third parties.

The Working Group proposed a merging of the various Council working groups dealing with internal security and removing the CATS from the legislative process, limiting its role to that of co-ordinator of operational co-operation.[371] The Constitutional Treaty provided for, as does Article 71 TFEU, the setting up of a Standing Committee on Internal Security (COSI) which should "ensure that operational cooperation on internal security is promoted and strengthened." It should "facilitate" the coordination of the activities of Member

[367] Craig, P., 'The Role of the European Parliament under the Lisbon Treaty', in: Griller, S. and Ziller, J., *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (Vienna, Springer Verlag, 2008), as well as Vos, E., *supra* note 365, 123.
[368] Final Report of Working Group IX on Simplification, CONV 424/02 ("Amato Report"), 12.
[369] Final Report of Working Group X on Freedom, Security and Justice, CONV 426/02, 3. The operational powers of the Council have been linked to the more autonomous role that the Council Secretariat has come to play in recent years: see: Curtin, D., 'European Legal Integration: Paradise Lost?', in: Smits, J. *et al*. (Eds), *European Integration and Law* (Antwerp, Intersentia, 2006), 31-32.
[370] House of Lords Select Committee on the EU, 'The Future of Europe: Constitutional Treaty - Draft Article 31 and Draft Articles from Part 2 (Freedom, Security and Justice)' (HL Paper 81, Session 2002-03, 16th Report, 27 March 2003), 16.
[371] Final Report of Working Group X, *supra* note 369, 16. See for an overview of the Council's working party structure: Monar, J, 'Justice and Home Affairs', in: Edwards, G. and Wiessala, G. (Eds), *JCMS The European Union 1999/2000: Annual Review of Activities* (Oxford, Blackwell, 2000), 137, Den Boer, M. and Wallace, W., *supra* note 22, 515 and Council Documents 5502/02, 6582/1/02 and 11602/09.

States' competent authorities. This seems to be a weaker formulation than if the article had stated that it may itself coordinate these activities. The COSI's functioning would be without prejudice to the powers of the COREPER. Representatives of relevant Union bodies, offices and agencies could be involved in its proceedings and the European Parliament as well as national Parliaments would have to be kept informed.

The COSI has been criticised by some for being an EU interior ministry in the making,[372] by others as a toothless standing committee[373] and again others have asked whether it would be necessary at all to formally provide for such a committee.[374] Considering its potentially important role in the JHA, the mentioning of the COSI in the Treaty seems justified. Bearing in mind that the EU is a system of attributed competences, it is difficult to see in which other legal basis the operational activities of the Council could find their foundation. In this respect the article on the COSI lacks precision and it will largely be left to the Council to decide on the exact definition of its tasks and composition.

In a Council Document mapping the preparatory work for the COSI, internal security was broadly defined encompassing both crime prevention and control, anti-terrorism, but also the provision of "an integrated management system for external borders as a major factor for preventing (certain) forms of crime within the EU."[375] Operational cooperation was defined as:

> "action related to concrete cases/events/crisis/phenomena, that require a trans-national approach, whereby all the concerned authorities of the Member States competent at national level for internal security issues collaborate with each other, i.e. bodies."[376]

It was however immediately emphasised that the COSI would not be directly in charge of conducting operational activities. The document provided three different options in terms of tasks for the new Committee. The first would limit COSI's tasks to operational planning. The second would also include strategic functions, such as the elaboration of an EU plan for internal security, evaluation and external relations. A final option, contrary to the history and

[372] Bunyan, T, 'The Creation of an EU Interior Ministry' (Statewatch News, April 2003), 3.
[373] Townsend, A, 'Can the EU Deliver in the Area of Freedom, Security and Justice?' (Brussels, EPIN Working Paper No. 9, September 2003), 11.
[374] Monar, J, 'A new "Area of Freedom, Security and Justice" for the Enlarged EU? The results of the European Convention', in: Henderson, K., *The Area of Freedom, Security and Justice in the Enlarged Europe*, (Hampshire, Palgrave MacMillan, 2005), 127.
[375] Council Document 6626/05, 2.
[376] *Ibid*.

wording of the article, would reintroduce a role in the legislative process.[377] In any case, were legislative tasks to remain outside the Committee's remit, a separate committee could be made responsible for the coordination of all legislative work related to "internal security." This would imply that in any case the four-level structure of law making in the Council in the AFSJ would remain intact under the new Treaty.[378]

The composition of the COSI would depend on the tasks given to it, but the Council contemplated fixed members. Representatives of EU bodies and agencies would only be present depending on the subject matters on the agenda. Interestingly, in the run-up to the establishment of the COSI, the Hague Programme had called upon the Council to organise half-yearly meetings between the chairpersons of SCIFA, CATS and representatives of the Commission, Europol, Eurojust, the European Border Agency (i.e. Frontex), the Police Chiefs' Task Force, and the Joint Situation Centre (SitCEN), thus giving a more permanent position to the agencies.[379]

When no-votes halted the ratification process of the Constitutional Treaty, the Council considered it inappropriate to continue setting up such a body.[380] No new structures should be created and reference to COSI was to be avoided.[381] Rather existing structures should be strengthened and made more efficient. A pilot-project was set up in the field of organised crime, essentially proposing ways of bringing together Chiefs of Police and the CATS, with additional input from relevant agencies and working groups. Here one may raise a question as to Frontex's involvement. As long as the Lisbon Treaty does not enter into force, Frontex's competences are limited to those under the First Pillar. Although this in itself does not stand in the way of cooperation on issues such as irregular migration, its involvement in other activities combating crime, seems to be beyond its remit.

The Council's document on the Architecture of Internal Security and the Council's Conclusions of 2008 seem to take only very small steps in the direction of a more centralised coordination of operational cooperation at EU level, referring once more to "better coordination" and "continuing reflection" on the functioning of the Council's working structures. At the same time, the six-monthly meetings between the JHA agencies and the

[377] Also the Commission had expressed the view that the COSI should not have legislative tasks (Council Document 5573/05).
[378] Monar, J., *supra* note 371, 135.
[379] The Hague Programme, *supra* note 80, point 2.5. The SitCen had originally dealt mostly with Second Pillar measures, monitoring on a constant basis potential threats. It has however expanded its remit into Justice and Home Affairs, providing strategic intelligence-based assessments on counter-terrorism matters: House of Lords Select Committee on the EU, 'After Madrid: the EU's response to terrorism' (HL Paper 53, Session 2004-2005, 5th Report, Session 2004-05), 61.
[380] Council Document 9596/1/06 REV 1, 1.
[381] Council Document 6290/06.

presidencies of the CATS and SCIFA have been in place since 2005 and they have been intensified upon recommendation by the Council.[382] One of the first topics on the agenda has been the exchange of information between these agencies. Importantly, it was decided by the heads of the EU JHA agencies that from now on the confidentiality rules/security regulations of other agencies, including those regulations governing classified information, would be considered as equivalent.[383]

The Lisbon Treaty implicitly confirms the *status quo* as regards regulatory agencies and it is unlikely that they will cease to exist after its entry into force. The explicit reference made to agencies throughout the reformed Treaties seems to support this view. It would however be going too far to read into these articles an implicit reversal of the *Meroni* doctrine.[384] A sound legal basis in the Treaty for the delegation of powers to these agencies, be they implementing or delegated, remains lacking.

There are two notable exceptions to the constitutional ignorance of agencies. The Lisbon Treaty, as did the Constitutional Treaty, provides an explicit legal basis for two of the (former) Third Pillar agencies: Europol and Eurojust, both of which have operational rather than legislative tasks. This leaves however unanswered the question of an agency such as Frontex, which is also endowed with the task of coordinating operational cooperation. As Curtin has rightly remarked the Constitutional Treaty fell short of "constitutionalizing" a framework for the administration of the Union as a whole, an observation which also applies to the Lisbon Treaty.[385] In this context it is not surprising that "a common understanding between the EU institutions of the purpose and role of agencies" also remains lacking.[386]

More specifically, one may wonder what the entry into force of the Lisbon Treaty would mean for the coordination of operational cooperation in the area of external borders management. One could imagine that the merging of the First and Third Pillar and the establishment of a Standing Committee within the Council, would cast an intergovernmental shadow over this cooperation, drawing Frontex back into the sphere of influence of the Council. Much would depend on the character of the COSI. If it were to function as coordinator of operational cooperation, in the area of external borders management this would

[382] Council Document 16831/06, 5.
[383] Council Document 11644/08. Currently, information exchange between agencies is subject to confidentiality agreements. The obligation to conclude such agreements flowed from the agencies' own security regulations which often replicate the Council's Security Regulations (Council Document 5775/01).
[384] Dougan, M., *supra* note 365, 651-652.
[385] Curtin, D., 'Mind the Gap: The Evolving EU Executive and the Constitution', Walter van Gerven Lecture, Katholieke Universiteit Leuven (Groningen, Europa Law Publishing, 2005), 7.
[386] COM(2008) 135, *supra* note 28, 2.

conflict with the position of Frontex as an independent agency set up for this purpose. If it were to take on more strategic tasks it would essentially take over SCIFA's current position, potentially also weakening the Commission's role.

8. Conclusion

This chapter has given a comprehensive overview of the legislation adopted under Title IV, which forms the legal framework within which the EU's external borders are managed. Although from the outset the EU's policy for the management of the external borders has been operational in character, legislation has taken on an increasingly important role.

The legislation discussed here covers a wide range of subject matters and legal bases. This has been so because of the Court's broad definition of a "measure developing the Schengen *acquis*", but also because of the link made between (irregular) migration and asylum and border management. The legislation adopted illustrates the different rationales for a European policy on the external borders which were identified in the previous chapter. While only a narrow Schengen borders *acquis* already discussed in Chapter VI regulates border checks and surveillance at the moment of border crossing itself, the other instruments aim at increased operational cooperation and solidarity between Member States. There is an undeniable focus on security concerns and immigration control. Moreover, most legislation is characterised by a firm believe in the possibilities of modern technology for the purpose of surveillance and information exchange. A discomforting feature here is the expansion of the remit of information systems originally adopted for the purpose of migration management into the field of general law enforcement.

Under the above legislation, the power to take implementing measures is now generally conferred on the Commission, under the supervision of a comitology committee. The amount of Community legislation adopted and the implementation thereof in accordance with standard Community practice does not however mean that the development of this area has become legislation-driven. Such a conclusion does not take account of the fact that in many cases operational activity has preceded and moulded legislative developments, as well as the undeniably operational character of the EU's activity carried out on the basis of the adopted legislation.

The important difference between legislation and its implementation on the one hand and the coordination of operational cooperation on the other, is that the latter does not create rights and obligations vis-à-vis third parties. This chapter has underlined that operational

coordination at the EU level consists of the coordination of operational activities carried out by and under the responsibility of the Member States. While in the Third Pillar coordination activities are explicitly conferred upon the CATS, a similar article is lacking in the First Pillar.

It has been argued that the legislation establishing Frontex has in a way "communitarised" the coordination of operational activities by removing this activity from under the purview of the Council to an independent Community body. In this respect the merging of the First and Third Pillar by the Lisbon Treaty and the establishment of the COSI could, depending of the role this standing committee is to be given, draw the management of the external borders policy back into the Council's sphere of influence.

Since operational coordination is less likely to raise sovereignty concerns, Member States have been more willing to consent to joint operational activity than to the adoption of legislation. However, in doing so, they appear to be oblivious of the potentially profound consequences of "mere" operational coordination. It has been argued that operational coordination is not a technical, value-free exercise and that the nature of the competences in the AFSJ calls for legislative decision-making. An additional reason for concern is that the non-binding character of operational coordination allows it to escape judicial review by the ECJ.

The Commission's Communication's on EURSUR and the future of external border management show a clear continuity in evolvement of the EU's activities in this field. They confirm once more the rationales discussed in the previous chapter. The measures proposed are not only characterised by their emphasis on practical cooperation, but also by their faith in the use of technology for the management of the external borders. This chapter has shown the difficulties and dangers of such an approach. The third Communication making up the Commission's border package consists of an evaluation and outlook on the future development of Frontex. This agency has beyond doubt become the most important actor at EU level for the management of the external borders, if not legally then symbolically. It forms the topic of the next chapter.

IX. The Institutionalisation of EU Border Management: Frontex

1. Introduction

> "Summing up I would like to remind that Frontex activities are supplementary to those undertaken by the Member States. Frontex doesn't have any monopole on border protection and is not omnipotent. It is a coordinator of the operational cooperation in which the Member States show their volition. If some of our critics think it is not enough they should fix their eyes on decision takers, as Frontex only executes its duties described in the Regulation 2007/2004."[1]

It is hard not to note the sense of frustration in the words of Frontex's Executive Director, in a press-release he issued in response to the criticism that his agency was not doing enough to prevent the drowning of migrants trying to reach Europe by sea.[2]

In the previous chapter Frontex was classified as one of the most important developments in the EU's management of the external borders. From the outset expectations of Frontex have been high in terms of its potential to tackle irregular migration. At the same time it has been argued that the Agency has been oblivious to the rights of asylum seekers and migrants.

The Executive Director's press-release may not show much empathy for the plight of irregular migrants and asylum seekers, but does contain an undeniable truth in the argument that Frontex's powers are limited by its founding regulation.[3] In order to evaluate how far both expectations and criticism on Frontex's functioning are justified it is necessary to look at the legal framework governing the Agency's activities.

Frontex is one of the EC's independent regulatory agencies. A discussion of the rationale behind the creation of these agencies will enable us to assess how Frontex fits within the EU's more general institutional framework and in how far it can be distinguished from other agencies.

For a correct understanding of the Agency it is indispensable that both its powers and organisational structure are explained. This chapter will continue with a more in-depth

[1] Ilkka Laitinen, Executive Director Frontex, 'Frontex: Facts and Myths' (Frontex Press Release, 11 June 2007).
[2] 'Europe's shame' (*The Independent*, 28 May 2007).
[3] Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L349/1 (hereinafter: "Frontex Regulation").

examination of the coordination by Frontex of Member States' operational activities. Although the importance of the Agency's other tasks should by no means be underestimated, operational coordination takes up most of its resources and gives rise to important legal questions. The discussion of Frontex's task of operational coordination will include the question of accountability of visiting border guards. It will be followed by an examination of the oversight mechanisms applicable to the Agency's overall functioning. A final section will scrutinise the Commission's plans for the future development of Frontex. It will show how the Agency continues to advance the integration of European border guard forces, whilst continuing to explore its potential of becoming *primus inter pares*.

2. Frontex as a Regulatory Agency

2.1 The Rationale of Agency Creation

The dominant approach towards the question of delegation to independent regulatory agencies is functional. Agency theory looks at the benefits a principal may derive from delegation to an agent, by lowering the transaction costs of political decision making.[4] The question why then these powers are delegated to regulatory agencies, and why these agencies are made independent, is "a special case of the more general problem of institutional choice of institutional design."[5]

The most common explanation holds that delegation offers advantages derived from the division of labour and specialisation.[6] Delegation enables governments to deal with a wide range of social issues.[7] First, delegation lowers decision-making costs by "allowing legislators to economise on the time and effort required to identify desirable refinements to legislation and to reach agreement on these refinements."[8] Second, it lowers decision-making costs

[4] Elgie, R., 'Why Do Governments Delegate Authority to Quasi-Autonomous Agencies? The Case of Independent Administrative Authorities in France', 19 *Governance* 2 (2006), 208.
[5] Pollack, M., *The Engines of European Integration: Delegation, Agency and Agency-Setting in the European Union* (Oxford, OUP, 2003), 20. See also Horn, M., '*The Political Economy of Public Administration* (Cambridge, CUP, 1995), 7 ff.
[6] Coleman, J. *Foundations of Social Theory* (Cambridge (MA), Harvard University Press, 1990).
[7] Lupia, A., 'Delegation of Power: Agency Theory', in: Smelser, N. and Baltes P. (Eds), *International Encyclopedia of the Social & Behavioral Sciences* (Oxford, Elsevier Science Limited, 2001), 3375.
[8] Majone, G., 'The regulatory state and its legitimacy problems', 22 *WEP* 1 (1999), 3.

linked to incomplete information.[9] In particular in areas of great complexity, governments benefit from the technical and/or scientific knowledge of expert agencies. They respond to the "mismatch between the Community's increasingly complex regulatory tasks and the available administrative instruments."[10] Delegation increases the efficiency of rule-making by leaving specific problems to be dealt with by the agent.[11]

The establishment of discretionary powers to independent agencies constitutes however a move away from the standard "chain of delegation" or "transmission belt" model of administrative law, in which the administration implements legislation under the political responsibility of the government.[12] An explanation can be found in the need for credible policy commitments.[13] Credibility can be described as the need for policy consistency in the face of political change. By insulating a regulatory policy from the political process, governments not only bind themselves to the policy choices they have made, but importantly also their successors.[14] Gilardi has shown a direct relationship between the amount of political uncertainty and the degree of formal independence granted to an agency.[15]

An important third explanation that deserves attention is the concept of blame shifting. Here it is argued that governments through delegation to regulatory agencies "avoid or at least disguise their responsibility for the consequences of decisions ultimately made"[16] This would also explain the expansion of regulatory authority beyond the economic sphere and the increasing importance of independent regulatory authorities in the management of risk.[17] The concept of blame shifting can moreover be linked to the argument that considers the increase in delegation to regulatory agencies as the response to a decline in trust in more traditional economic and political institutions.[18] Indeed, in response to widely publicised scandals which

[9] Pollack, M, *supra* note 5, 21; Thatcher, M. and Stone Sweet, A., 'Theory and Practice of Delegation to Non-Majoritarian Institutions' 25 *WEP* 1 (2002), 4; Elgie, R., *supra* note 4, 208.
[10] Majone, G., 'The Credibility Crisis of Community Regulation', 38 *JCMS* 2 (2000), 275.
[11] Thatcher, M. and Stone Sweet, A., *supra* note 9, 4.
[12] Strøm, K., 'Delegation and accountability in parliamentary democracies' 37 *EJPR* 3 (2000), 261; Vos, E., 'Reforming the European Commission: What Role to play for European Agencies', 37 *CMLRev* 5 (2000), 1123.
[13] Majone, G., *supra* note 8, 4-5.
[14] *Ibid*, 5. Moe, T., 'The Politics of Structural Choice: Toward a Theory of Public Bureaucracy', in: Williamson, O. (Ed.), *Organization Theory. From Chester Barnard to the Present and Beyond* (Oxford, OUP, 1995), 124. In binding their successors, they avoid so-called "political drift": Kelemen, D., 'The Politics of "Eurocratic" Structure and the New European Agencies', 24 *WEP* 4 2002, 96.
[15] Gilardi, F., 'The Same, But Different: Central Banks, Regulatory Agencies, and the Politics of Delegation to Independent Authorities', 5 *CEP* (2007), 306.
[16] Fiorina, M., 'Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?,' 39 *Public Choice* (1982), 47.
[17] Moran, M., 'The Frank Stacey Memorial Lecture: From Command State to Regulatory State,' 15 *PPA* 4 (2000), 9-11. Jordana, J. and Levi-Faur, D., *The Politics of Regulation: Examining Regulatory Institutions and Instruments in the Age of Governance* (Cheltenham, Edward Elgar, 2004), 15.
[18] Jordana, J. and Levi-Faur, D., *ibid.*, 13.

are likely to have negatively affected public trust in an area of regulation, governments have responded with the establishment or consolidation of independent regulatory authorities.[19]

2.2 Application to the EU Context

It should first be recalled that as a consequence of the *Meroni* doctrine the powers of regulatory agencies at EU level are considerably more limited than those of their national counterparts.[20] Therefore, EC agencies can be considered independent only in terms of their own legal personality, autonomous governing bodies and financial independence.[21] In addition, some authors have argued that the granting of implementing powers to agencies does not amount to the delegation of powers by an EC institution, but rather to the extraction of powers from national administrations.[22]

Community agencies have generally been created in response to the increased requirement for information and co-ordination at the Community level resulting from the internal market project.[23] They have allowed the EC to expand the scope of its regulatory policies, without overstretching the Commission's administrative capacity. Under the heading "Better application of EU rules through regulatory agencies", the Commission's White Paper on European Governance summed up the advantages of the agency approach as follows:

> "The advantage of agencies is often their ability to draw on highly technical, sectoral know-how, the increased visibility they give for the sectors concerned (and sometimes the public) and the cost-savings that they offer to business. For the Commission the creation of agencies is also a useful way of ensuring it focuses resources on core tasks.[24]

In 2008, the Commission argued along the same lines that:

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[19] *Ibid.*, 15.
[20] Case 9/56, *Meroni* [1957] ECR 11 at 147-149 and Case 10/56, *Meroni* [1958] ECR 53 at 169-171.
[21] All agencies have separate, autonomous budgets, however only a few enjoy financial independence from a subsidy from the EC general budget: Vos, E., 'Agencies and the European Union, in: Zwart, T. and Verhey, L. (Eds), *Agencies in European and Comparative Law* (Antwerp, Intersentia, 2003), 118.
[22] Geradin, D. and Petit, N., 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' (New York, Jean Monnet Working Paper 01/04, 2004), 15. Rather, in the EU context there are multiple principles, namely national governments, acting as Members of the Council, the Commission and the European Parliament: Dehousse, R., 'Delegation of Powers in the European Union: The Need for a Multi-principals', 31 *WEP* 4 (2008), 793. See also: Curtin, D., 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' 13 *ELJ* 4 (2007), 528, as well as Sabel, C. and Zeitling, J., 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU,' 14 *ELJ* 3 (2008), 304.
[23] Vos, E., *supra* note 12, 1117.
[24] COM(2001) 428 final, Commission White Paper on European Governance, 24.

> "They help the Commission to focus on core tasks, making it possible to devolve certain operational functions to outside bodies. They support the decision-making process by pooling the technical or specialist expertise available at European and national level. And the spread of agencies beyond Brussels and Luxembourg adds to the visibility of the Union."[25]

In the European context, the need for credibility in face of the growing politicisation of the Commission is often considered to play a key-role in the establishment of regulatory agencies.[26] This politicisation is a consequence of the transfer of tasks involving the use of political discretion to the European level and the increase in Parliament's powers of control and direction over the Commission.[27] Moreover, functionalist theories of integration hold that integration is most likely to occur within fields that are shielded from the direct clash of political, and in the EU often national, interests.[28]

The need for the credibility of EC regulatory policies is also used in the sense that the public must be able to have confidence in those policies on the basis of their effectiveness and efficiency.[29] This point relates more to the issue of trust than to policy consistency, but is equally valid. Also at the EU level the occurrence of a crisis has in a number of cases been at the basis of the decision to create an agency.[30] Examples include the establishment of the European Food Safety Authority (EFSA) in the aftermath of the BSE crisis and the European Maritime Safety Agency (EMSA) after the sinking of the oil-tanker Prestige.[31]

However, just as functionalist explanations cannot account for the variety in the nature and extent of delegation to agencies in Western European countries, the emergence of agencies in the EC cannot merely be considered as "the natural response to the expansion of

[25] COM(2008) 135, Commission Communication on European Agencies - The Way forward, 2.
[26] Everson, M. and Majone, G., 'Part One: General Principles', in: Everson, M. *et al*., 'The Role of Specialised Agencies in Decentralising European Governance' (Report Presented to the Commission, 1999), 20-21, Yataganas, X, 'Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies' (New York, Jean Monnet Working Paper 03/01, 2001), 37.
[27] *Ibid*. See also Curtin, D. and Egeberg, M., 'Tradition and innovation: Europe's accumulated executive order' 31 *WEP* 4 (2008), 647.
[28] Everson, M. and Majone, G., *ibid*. Shapiro refers to this as 'a kind of "neo-functionalism"': Shapiro, M., 'The Problems of independent Agencies in the United States and the European Union, 4 *JEPP* 2 (1997), 281.
[29] See for instance Majone, G., 'The Credibility Crisis of Community Regulation' 38 *JCMS* 2 (2000), 276.
[30] Report by the Working Group Establishing a Framework for Decision-Making Regulatory Agencies (Group 3a), 'Preparation of Commission White paper on Governance' (SG/8597/01-EN, June 2001), 6.
[31] See for instance: Vos, E., 'EU Food Safety Regulation in the Aftermath of the BSE Crisis', 23 *JCP* 3 (2000), 228. Similarly in response to the financial crisis there are calls for increased, centralised supervision: COM(2009) 252 final, Commission Communication on European financial supervision, 3.

the EU's regulatory role."[32] Often the establishment of small, independent, expert bodies was the only viable alternative in areas in which the Member States acknowledged the need for a Community approach, but opposed an additional transfer of powers and resources to the Commission.[33] Often the decision to create an agency was also "motivated by the need to respond to the particular circumstances of the moment."[34]

Community agencies generally form the focal point of a network of national administrative agencies, confirming the observation by Curtin and Egeberg that "Europe's new administrative order does not replace former orders; instead it tends to be layered around already existing orders."[35] This could of course be explained by the urge felt by the Member States to protect national bureaucratic interests.[36] However, probably as important is the fact that the network structure of agencies allows them to function as a permanent venue for deliberation between the different levels of governance in a particular regulatory area, contributing to a more uniform implementation of EC law.[37] Hofmann has argued that the emergence of "a system of decentralised, yet cooperative, administrative structures" is intimately linked with the development of the principle of subsidiarity.[38] Sabel and Zeitlin rather view agencies that function as a network as an expression of "experimental governance," through which broadly formulated policy goals laid down by the Member States and Institutions can be implemented by lower level units.[39]

2.3 Application to Frontex

From the description of Frontex's genesis in the preceding chapter, one can conclude that Frontex is first of all the outcome of a "re-balancing" of powers between the Member States,

[32] Thatcher, M., 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation', 25 *WEP* 1 (2002), 134; Kelemen, D., *supra* note 14, 94.
[33] Kelemen, D., *ibid*, 95.
[34] Report by the Working Group Establishing a Framework for Decision-Making Regulatory Agencies (Group 3a), *supra* note 30.
[35] Curtin, D. and Egeberg, M., *supra* note 27, 640.
[36] Kelemen, D., *supra* note 14, 110.
[37] Dehousse, J., 'Regulation by Networks in the European Community: The Role of European Agencies', 4 *JEPP* 2 (1997), 255. Vos, E., *supra* note 21, 125.
[38] Hofmann, H., 'Mapping the European administrative space', 31 *WEP* 4 (2008), 667-668. Over a decade earlier, Kreher considered administrative integration the main motivation for the creation of agencies at EC level: Kreher, A., 'Agencies in the European Community: A Step towards Administrative Integration in Europe' 4 *JEPP* 2 (1997), 242.
[39] Sabel, C. and Zeitling, J., 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU,' 14 *ELJ* 3 (2008), 273-4.

the Council and the Commission following the communitarisation of this policy area, constituting an important shift to a more Community approach.[40]

If one is willing to accept that the coordinating activities of SCIFA+/PUC were purely intergovernmental arrangements, the case of Frontex confirms that in the case of delegation to agencies, powers are often transferred vertically (from the national to the EU level), rather than horizontally (from Community institutions to specialized agencies).[41] In this context, some authors have argued that the granting of implementing powers to agencies does not amount to the delegation of powers by an EC institution, but rather to the extraction of powers from national administrations.[42] Even if one considers the coordinating activities of the SCIFA+/PUC to have constituted Community activity, it can still be argued that the transfer of operational coordination from the PUC to Frontex has entailed a shift from a Member States driven coordination within the Council to a more supranational approach within a Community agency.

The Agency's establishment formed a way of remedying the failure of intergovernmental cooperation in the PUC, shielding the policy area from national politics, without having to carry over these powers to the Commission.[43] The Commission in its turn realised that it did not have the resources to take on the task of coordinating operational coordination itself. It was moreover very much aware of Member States' sovereignty concerns. It is telling that the Commission's more ambitious plan for the creation of a European Corps of Border Guards did not envisage that such Corps would substitute national border guard authorities. Recital 4 to Frontex's founding regulation emphasises that "[t]he responsibility for the control and surveillance of external borders lies with the Member States."

However, regarding Frontex solely as the rational outcome of less successful attempts at cooperation and the re-balancing of powers between Institutions and Member States, would give an incomplete picture of the reasons behind its establishment. As with all agencies, Frontex needs to be situated in its proper context, in this case the EU's wider border and

[40] See Neal, A., 'Securitization and Risk at the EU Border: The Origins of FRONTEX'S, 47 *JCMS* 2 (2009), 343.
[41] Dehousse, R., 'Misfits: EU Law and the misfits of European Governance' (New York, Jean Monnet Working Paper 2, 2002), 12. See also the EP Report on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders, (A5-0093/2004), 30.
[42] Geradin, D. and Petit, N., *supra* note 22, 15. See in more detail on the difficulty of applying principle-agent theory to the delegation to EC agencies: Curtin, D., *supra* note 22, 528.
[43] Cf. Kelemen, D., *supra* note 14, 95.

migration policy.[44] A closer look should be taken at the Agency's tasks, as well as at the background against which it was established. Here one can find the existing literature on agency creation at Community level to be remarkably well applicable.[45]

The management of the external borders is clearly a policy area in which Member States fear the transboundary consequences of an uneven application of the Community *acquis*. Not only could this lead to unequal treatment of both EU citizens and third country nationals depending on where they cross the external borders of the European Union, but also because the protection of the external borders of the Schengen area is as strong as its weakest link.[46]

Article 1 of the Frontex Regulation states that the Agency should improve the integrated management of the external borders. It should render more effective the application of the Community's border *acquis* and contribute to an efficient, high and uniform level of control by coordinating Member State's action for the implementation of this *acquis*. It should further provide the Commission and the Member States with the necessary technical support and expertise and promote solidarity between Member States. The agency's tasks are laid down in more detail in Article 2(1):

a) coordinate operational cooperation between Member States in the field of management of external borders;
b) assist Member States on training of national border guards, including the establishment of common training standards;
c) carry out risk analyses;
d) follow up on the development of research relevant for the control and surveillance of external borders;
e) assist Member States in circumstances requiring increased technical and operational assistance at external borders;
f) provide Member States with the necessary support in organizing joint return operations;
g) deploy Rapid Border Intervention Teams to Member States in accordance with Regulation (EC) No 863/2007.

Additionally, under Article 14(8) read in conjunction with Article 15 of the Decision creating a European Borders Fund (EBF), the Agency has the task of carrying out a risk analysis for

[44] See Chapter VII.
[45] See for a different view: Pollak, J. and Slomisnki, P, 'Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders,' forthcoming in *West European Politics*. The authors look at the establishment of Frontex through the lens of experimentalist governance. This approach looks at the agency in *functional* rather than *structural* or *institutional* terms: Sabel, C. and Zeitling, J., *supra* note 39, 274.
[46] Magnette has pointed out that agencies have been created in policy areas in which the Member States fear the consequences of non-coordination: Magnette, P., 'The Politics of Regulation in the European Union', in: Geradin, D. *et al*., *Regulation through Agencies in the EU: A New Paradigm of European Governance* (Cheltenham, Edward Elgar Publishing, 2005), 10.

the purpose of the annual distribution of resources, reporting annually to the Commission and identifying "the current levels of threat at the external borders."[47] Although not explicit in the operative part of the Decision, the recitals further state that the agency should be consulted by the Commission on draft multiannual programmes and strategic guidelines.[48] It may also be asked for an opinion in the assessment of the impact of the Fund.[49]

Frontex can be understood to be an agency with a dual identity. On the one hand it is a "classic" regulatory agency which assists in the implementation of an EC policy through the provision of technical and informational assistance. These are the tasks listed under b) and d) and to the extent that risk analyses are made for the Member States also c). Also in its preparation of advice under the EBF, the Agency can be considered to be fulfilling a role similar to that of Community agencies in other areas of regulatory policy.[50] The argument can be readily made that the involvement of an independent agency contributes to the credibility of this financial burden sharing instrument in that it leaves the decision on the weighing factors, which ultimately determine the amount of money allocated to a certain Member State, to an a-political, expert agency.[51]

On the other hand, Frontex is an agency endowed with the coordination of operational cooperation between law enforcement agencies of the kind one could previously observe only under the Third Pillar.[52] These are the tasks listed under a), e), f) and g). Rather than forming the locus for deliberative policy making, the Frontex network allows for the exchange of information, the establishment of contacts between national border guard authorities and the fostering of a culture of mutual trust. An additional, distinctive feature of Frontex is the pooling of resources, technical and human, of the various participants in the network.

Frontex is a coordinating body, forming part of a network consisting of national border guard authorities. This network structure not only protects national border guard authorities' prerogatives, it also reinforces them. This is particularly true for those Member States which

[47] Article 15, Decision No 574/2007/EC establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', *OJ* 2007, L144/22 (hereinafter: "EBF").
[48] Recital, 16, EBF.
[49] Recital 17, EBF.
[50] For instance in the area of medicine regulation and in the area of food safety, the Commission makes its decisions on the basis of scientific advice prepared by regulatory agencies, the European Medicines Agency (EMEA) and the European Food Safety Agency (EFSA) respectively.
[51] Geradin, D. and Petit, N., *supra* note 22, 36. See also Everson, M. and Majone, G., *supra* note 26, 21.
[52] See the tasks of Europol and Eurojust: Council Decision 2009/371/JHA establishing the European Police Office (Europol), *OJ* 2009, L121/37 and Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crimes, *OJ* 2002, L63/1.

as a result of the enlargement of the Schengen area no longer have external land borders as it grants national border guard authorities a continuing involvement and importance in their area of expertise.[53] The Agency's task of providing support to joint return operations highlights the link between the national border guard authorities and Frontex.[54]

Under the First Pillar, only the Community Fisheries Control Agency (CFCA) has similar powers of coordination of national enforcement activity.[55] The Common Fisheries Policy and the External Borders Regime have in common that Member States may be lacking trust in the enforcement authorities of other Member States and their ability to fulfil their tasks effectively. This may be the result of a lack of capacity/resources, as was the case in some of the accession countries, or a deliberate national policy of non-enforcement.[56] Here a credibility argument can be put forward that does not relate to the consistency of the Community policy itself, but to the need for an effective enforcement in order for any given policy to be credible, not merely in the eyes of the public, but in particular for the individual Member States.

As was argued above, the credibility argument can be linked to the question of trust. In the European context, the widely reported arrival of immigrants across the Mediterranean and Atlantic, the framing of this phenomenon as constituting a (humanitarian) crisis and the authorities' apparent incapacity to deal with this situation has eroded the authority of both Member States' governments and the Commission. Frontex is meant to restore that trust within the Member States directly affected by showing that the EU is making a serious effort to tackle the situation and give practical meaning to the concept of solidarity.[57] In addition it should reassure the Member States that are not directly affected that measures are being taken to protect the most vulnerable parts of the common external borders.

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[53] Bigo, D, 'Frontier Controls in the European Union: Who is in Control?', in: Bigo, D. and Guild, E. (Eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Aldershot, Ashgate, 2005), 67. See also: Baumann, M., Der Deutsche Fingerabdruck: Die Rolle der deutschen Bundesregierung bei der Europäisierung der Grenzpolitik (Baden-Baden, Nomos, 2006).

[54] Article 2(1)(f), Frontex Regulation. As follows from recital 11 of the Frontex Regulation, this task was included because within the Member States the operational aspects of removal of third-country nationals fall within the competencies of the authorities responsible for controlling the external borders.

[55] The Commission in COM(2008) 135 final, 7, divides agencies in a number of categories, one of which is "Agencies in charge of operational activities". It does however not define what is to be understood under "operational activities". The Commission includes in this category the European Police College (Third Pillar), as well as the European Railway Agency (ERA) and the European GNSS Supervisory Authority (First Pillar). These agencies are however not "operational" in the sense that they coordinate operational cooperation between national law enforcement authorities.

[56] See for instance Case C-304/02, *Commission v. France* [2005] ECR I-6263.

[57] Not without reason the Commission in a leaflet called 'Europe and You' presented the tackling of illegal immigration under the coordination of Frontex as a prime example of how the EU in 2006 "helped out in global hot spots": http://ec.europa.eu/publications/booklets/others/61/en.pdf.

The Commission presented the proposal for the Agency's establishment against the background of widely reported irregular landings at the EU's southern maritime borders, and its adoption came shortly after another summer witnessing the arrival of irregular migrants by sea. Similarly, irregular migration by sea formed an important motivation behind the proposal for the Regulation establishing a mechanism for the deployment of so-called Rapid Border Intervention Teams (RABIT), allowing the agency to respond swiftly to a "sudden influx" of irregular migrants.[58]

Dauvergne has argued that one way in which migration law has been securitised in the wake of 9/11 is precisely through the creation of new agencies, dealing with immigration, borders and security, moving migration issues into an organisational structure with a different governing ethos.[59] This was for instance the case in the United Kingdom, Canada and the United States.[60] It has been argued that regulatory agencies, due to their specialist nature and limited mandate, run the risk of taking a one-sided approach to complex problems.[61] The fact that most Frontex staff are officials recruited from national enforcement authorities or seconded national experts (SNEs) is likely to reinforce a particular perception of the management of migration.[62]

The creation of these agencies has aimed to restore trust in governments' capacity to effectively guard the borders against a range of security threats and uphold the myth of control over borders, and as such they can be considered both a result and a catalyst for the securitisation of migration law. The European Council of October 2003 recalled "the common interest of all Member States in establishing a more effective management of borders, in

[58] See in detail below. Neal opposes the application of the "securitisation logic" to Frontex, underlining that the Agency's focus is on risk analysis as a means of rationalizing Member States border controls. He does recognise "the return of security" in the demands put upon the Agency and the adoption of the RABIT Regulation: Neal, A., *supra* note 40, 350.

[59] Dauvergne, C., '*Making People Illegal: What Globalisation means for Migration and Law* (Cambridge, CUP, 2008), 97.

[60] See e.g. the creation of the US Customs and Border Protection in 2003, the Canadian Border Services Agency in 2003 and the UK Border Agency in 2008.

[61] Williams, G., Monomaniacs or Schizophrenics?: Responsible Governance and the EU's Independent Agencies', 53 *Pol Stud* 1 (2005), 90 ff. Note however that in the same article Williams refers to the danger of a dispersal of powers between agencies, causing problems of coordination. Frontex has been meeting with the heads of the Community Fisheries Control Agency (CFCA) and the European Maritime Agency in order to coordinate possible activity within the framework of the EU's maritime strategy: Frontex News, 28 August 2008.

[62] Shapiro, M., *supra* note 28, 283. See Article 17(3), Frontex Regulation. The ECRE Report on Defending Refugees' Access to Protection in Europe (London, December 2007), 13, notes that the composition of the Agency's staff mirrors the situation in EU Member States where generally the task of migration control is separated from the granting of international protection.

particular with a view to enhancing the security of their citizens," welcoming the Commission's intent to present a proposal for the establishment of Frontex.[63]

It becomes clear from looking at Frontex's tasks that customs operations or (phyto-) sanitary controls (First Pillar) and the prevention and detection of crime (Third Pillar) are outside its remit. However, should the Lisbon Treaty enter into force, one can expect Frontex's competences to eventually be expanded to cover tasks currently covered by the Third Pillar.[64] Moreover, the emphasis on horizontal integration between border and customs authorities as an important step towards achieving a truly integrated border management should be read in the light of Dauvergne's observations.[65] Rather than constituting a move away from the exclusive focus on irregular migration, one could interpret this to be an example of how border and migration management is drawn into a security context, considering that customs tasks have expanded from collecting customs duties and indirect taxes at import, to goods related security questions such as organised crime and terrorism.[66] In this respect, the proposal to establish a European Asylum Support Office as a separate entity should be seen as positive.[67]

Importantly, the creation of Frontex allows the Commission and the Member States to effectively shift the blame for the loss of life and human suffering that coincides with ever more desperate attempts to evade ever stricter border controls.[68] At the same time, a failure to kerb irregular migration would be attributed to the Agency rather than the Community institutions. Although the Executive Director of Frontex has on more than one occasion stressed that Frontex cannot be a *panacea* against irregular migration, political discussions on

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[63] European Council Conclusions, Brussels, 16-17 October 2003, under III.

[64] In fact the EU Counter-terrorism coordinator, Gilles de Kerchove, has already argued in favour of the entry into force of the Lisbon Treaty in order to enable Frontex to cover all security aspects: 'Europa is kwetsbaar voor terrorisme' (*De Standaard*, 11 September 2008).

[65] The Hague Programme, Annex to the European Council Conclusions, Brussels, 4-5 November 2004, point 1.7.1 and COM(2008) 67 final, Commission Report on the evaluation and future development of the FRONTEX Agency, 9.

[66] COM(2008) 169 final, Commission Strategy for the evolution of the Customs Union, 2. See also the "Security Amendment" to the Community Customs Code: Regulation (EC) No 648/2005, amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, *OJ* 2005, L 117/13.

[67] COM(2009) 66 final, Commission Proposal for a Regulation establishing an Asylum Support Office. Also the conclusion of a working arrangement with the UNHCR and IOM on the basis of Article 13 of the Frontex Regulation should allow for an increased awareness within the Agency of the rights of migrants and refugees. The Commission has furthermore called for the development of specialised training courses on relevant provisions of European and international rules on asylum, the law of the sea and fundamental rights: COM(2008) 67 final, *supra* note 65, 5.

[68] Fiorina, M., *supra* note 16, 47. Note that on the internet a range of sites target Frontex rather than the EU's immigration and asylum policy. To name a few:
http://no-racism.net/article/2401/;
http://frontex.antira.info/;
http://www.frontex.info.pl/category/language/english. In June 2008 a protest against the Agency was organised at the Frontex headquarters in Warsaw, Poland: http://www.noborder.org/item.php?id=442#programme.

ways to tackle irregular migration almost inevitably conclude with a call for a reinforcement of the Agency.[69] The Agency's human resources (staff and seconded national experts) have been growing from a mere 45 in 2005, to 100 in 2007, surpassing 200 in 2008.[70] Its budget has increased substantially from 6.2 million euro in 2005 to slightly over 70 million in 2008, as high as the 2013 budget initially foreseen for the Agency.[71] At the same, the Court of Auditors has noted that nearly 70 % of the appropriations available for 2007 were not spent.[72]

3. Organisational Structure

In order to better understand the Agency's functioning, it is necessary to study the tasks and powers of its organs, as well as its internal organisation. Some authors have argued that the institutional design of Frontex "leans" to the Council as a principle.[73] However, the Agency's set-up is in reality comparable to that of the majority of Community agencies.

Frontex's most important official is its Executive Director, who represents the Agency and is responsible for its management.[74] More specifically his/her powers and tasks are listed in Article 25(2) of the Regulation. These include the responsibility for the preparation and implementation of decisions of the Agency's governing body, the Management Board, as well as for the Annual Working Programme, the Activity Report and the Annual Budget. As regards the implementation of the budget, the Executive Director performs the duties of authorising officer.[75] The Executive Director is also the appointing authority as regards the Agency's staff. The Executive Director may delegate his/her tasks to other members of the Agency's staff.[76] The Executive Director is assisted by a Deputy Executive Director, who in

[69] See for instance the Results of the JHA Council, Luxembourg, 5-6 October 2006 (Council Document 13068/06, 16); the Draft Council Conclusions on further reinforcing the EU's Southern Maritime Borders (Council Document 12712/1/07 REV 1, point III.c); the Pact on Immigration and Asylum adopted by the European Council at its meeting of 15-16 October 2008 (Council Document 13440/08), 10; European Council Conclusions, Brussels, 21-22 June 2007, point 18.
[70] http://www.frontex.europa.eu/faq/. For the number of EC staff see the EC's general budget, Annex Part C on staff.
[71] http://www.frontex.europa.eu/finance/. SEC(2008) 148, Impact Assessment accompanying COM(2008) 68, Commission Report on the evaluation and future development of the FRONTEX Agency, 8.
[72] Court of Auditors, Report on the annual accounts of Frontex for the financial year 2007 together with the Agency's replies (2008/C 311/06), *OJ* 2008, C 311/34.
[73] Curtin, D., *supra* note 42, 528 and Neil, A., *supra* note 40, 343.
[74] Articles 15 and 25, Frontex Regulation.
[75] See Article 33, Commission Regulation (EC, Euratom) No 2343/2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, *OJ* 2002, L357/72.
[76] Article 25(3)(f), Frontex Regulation.

his absence or indisposition replaces him/her.[77] In line with most Community agencies, they are appointed by the Management Board.[78] The Executive Director is appointed on the basis of a list of candidates proposed by the Commission.[79] Their term of office is five years and is renewable once for the same period.[80]

The Executive Director is accountable to the Management Board.[81] The Management Board consists of the representatives of all Member States and two members appointed by the Commission. In practice most national representatives are the operational heads of the national services responsible for border guard management, which means that the composition of the Management Board largely coincides with that of the PUC. They serve for four years, renewable once. The Management Board meets formally at least twice a year.[82] From amongst its Members it appoints a chairperson and deputy-chair person, for a once renewable term of two years.[83] Initially, the Commission proposed - in line with the never-concluded draft interinstitutional agreement on the operating framework for the European regulatory agencies - a smaller Management Board, consisting of twelve members appointed by the Council and two members appointed by the Commission."[84] The Parliament, in order to reinforce the Community character of the Agency, had proposed that six of these Members would be appointed by the Commission and six by the Council.[85] Although this has not been the case in practice, the Regulation allows for the establishment of an Executive Bureau which would assist the Executive Director and could be allowed to take, in case of urgency, certain provisional decisions on behalf of the Management Board.[86]

The powers of the Management Board are detailed in Article 20 of the Frontex Regulation. The general voting rule laid down in Article 24(1) is absolute majority. The appointment (and dismissal) of the Executive Director and his/her Deputy is however decided

[77] Article 26(3), Frontex Regulation.
[78] Articles 26(2) and (4), Frontex Regulation.
[79] Article 26(1), Frontex Regulation.
[80] Article 26(5), Frontex Regulation.
[81] Article 25(4), Frontex Regulation. See Articles 20 and 21 for the powers of the Management Board and its composition.
[82] Article 23, Frontex Regulation.
[83] Article 22, Frontex Regulation. Currently Robert Strondl (Austria) is chairperson. Manuel Jamela Palos (Portugal) is deputy chairperson.
[84] Article 18, COM(2003) 687 final, Proposal for a Council Regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders. Note that with the exception of the European Food Safety Agency (EFSA) all other Community agencies have Management Boards consisting of at least one representative per Member State.
[85] EP legislative resolution on the proposal for a Council regulation establishing a European Agency for the Management of Operational Co-operation at the External Borders (COM(2003) 687 – C5-0613/2003 – 2003/0273(CNS)), amendment 31.
[86] Article 20(7), Frontex Regulation.

by a two-thirds majority.[87] The Programme of Work, outlining the Agency's activities for the coming year, is adopted by a three-quarters majority.[88] The Management Board's Rules of Procedure allow for a decision to be taken by written procedure, provided that one-third of the voting members does not object.[89]

Under Article 16 of the Frontex Regulation, the Management Board can establish specialised branches of the Agencies, which should build upon the expertise of the ad-hoc centres previously established. However, so far, no such branches or "regional offices" have been established. Both Parliament and the Executive Director of the Agency have shown themselves reluctant towards their creation.[90] Nevertheless, the Report on the Evaluation and Future Development of Frontex considers that serious consideration ought to be given to this option, in view of "the developments towards permanent operations and the evolution of the tasks for the Agency."[91] For some Member States' the possibility of hosting such a branch may be an important motivation for their support, although indeed the focus on joint operations at the southern maritime external borders may call for a specialised branch there merely from the point of view of cost-efficiency.[92]

Under Frontex's initial internal organisation six units reported directly to the (Deputy) Executive Director. As of 2007 the units have been brought under three separate divisions headed by a director: Operations, Capacity Building and Administration.[93] So-called National Frontex Contact Points (NFPoCs) were established as soon as the Agency became operational in 2005. The RABIT Regulation specifically lays down the obligation for Member States to set up a national contact point for communication with Frontex on all matters pertaining to the RABITs.[94]

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[87] Article 26(2), Frontex Regulation.
[88] Article 20(2)(c), Frontex Regulation.
[89] Article 8, Frontex Management Board Decision of 25 May 2005 on Rules of Procedure of the Management Board. In case of urgency any means of communication may be acceptable.
[90] Amendment 26, European Parliament Legislative Resolution of 9 March 2004 ((P5_TA(2004)0151), proposed the deletion of the Article.
[91] COM(2008) 67 final, *supra* note 65, 4. The European Parliament has opposed the creation of "a large number of decentralised agencies", but has at the same time stated that "consideration might be given at this stage to setting up two distinct external offices - one coordinating activities at land borders, the other for sea operations": EP Resolution of 18 December 2008 on the evaluation and future development of the FRONTEX Agency and of the European Border Surveillance System (EUROSUR) (2008/2157(INI)), point 26.
[92] See also the Position Paper on Illegal Migration and Asylum in the Mediterranean Region of 13 January 2009 by the four southern Member States united in the Quadro Group (Greece, Cyprus, Italy and Malta), 5: http://www.interno.it/mininterno/export/sites/default/it/assets/files/16/0970_Final_paper_Versione_firmata.pdf. See for an illustration of the importance attached to the seat of the various Community agencies the discussion at the end of the Laeken summit, quoted by Vos, E., *supra* note 21, 126-127.
[93] http://www.frontex.europa.eu/structure/.
[94] In practice these are the same as the already existing NFCoPs, although some Member States initially appointed different contact points.

An important feature of Frontex's network structure is the exchange of (operational) information with and between national authorities. Article 11 of the Frontex Regulation stipulates that the Agency may take all necessary measures to facilitate the exchange of information relevant for its tasks with the Commission and the Member States. It has been associated with the ICO-net through a Memorandum of Understanding with the Commission.[95] A recent Commission Proposal would enable Frontex to attend the meetings organised within the framework of the Immigration Liaison Officers Network.[96] A Frontex Situation Centre (FSC) has been established as a unit of the Operations Division, tasked with monitoring the situation at the external borders on a constant basis. All incoming and outgoing operational information is processed through the FSC.[97] A secure Frontex Information System is being developed for the exchange of classified, strategic information and intelligence related to illegal immigration with Europol on the basis of the working arrangement concluded with this agency in March 2008.[98]

Although the UK and Ireland have been excluded from participation in the Agency, they are invited to and attend the meetings of the Management Board.[99] They have also established a FNPoC. Article 12 of the Frontex Regulation provides that the Agency shall facilitate operational cooperation with the UK and Ireland in matters covered by its activities and to the extent required for the fulfilment of its tasks, including joint (return) operations.

The Frontex Regulation in Article 21(3) specifically states that Schengen Associated Countries (SAC) will participate as members of the Management Board of the Agency, albeit with limited voting rights. The modalities for this participation are laid down in an international agreement between the EC and Norway and Iceland.[100] Article 2 of the Agreement states that they shall have voting rights as regards decisions on activities carried out at or in the vicinity of their border, as well as activities under the following provisions of the Frontex Regulation: Article 3 (joint operations and pilot projects at external borders), Article 7 (management of technical equipment), Article 8 (support to Member States in

[95] Memorandum of Understanding between the European Commission and FRONTEX concerning the development of ICONet, final text as approved by the Commission on 15 February 2007 in written procedure.
[96] Article 1(2), COM(2009) 322 final, amending Article 4(2) of Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network, *OJ* 2004, L64/1.
[97] Frontex General Report 2008, 13: http://www.frontex.europa.eu/annual_report
[98] House of Lords Select Committee on the EU in its Report on 'EUROPOL: coordinating the fight against serious and organized crime' (HL Paper 183, Session 2007-08, 29th Report, 12 November 2008), supplementary evidence given by the Home Office, Question 47. The Working Arrangement has been agreed on the basis of Article 13, Frontex Regulation.
[99] Article 23(4), Frontex Regulation.
[100] Council Decision 2007/511/EC on the conclusion, on behalf of the Community, of an Arrangement between the EC, Iceland and Norway on the modalities of the participation by those States in Frontex, *OJ* 2007, L188/15.

circumstances requiring increased technical and operational assistance at external borders) and Article 9(1), first sentence (joint return operations) to be carried out with human resources and/or equipment made available by Iceland and/or Norway. They furthermore have voting rights under Article 4 of the Frontex Regulation on decisions regarding risk analysis which directly affect them and under Article 5 of the Frontex Regulation on decisions regarding training activities, except the common core curriculum. It is interesting to see that the other provisions of the Agreement, specifically mention parts of the Frontex Regulation, for instance in relation to the jurisdiction of the European Court of Justice (ECJ), that are applicable to Norway and Iceland. This shows once more that the SAC cannot be fully equated with the Member States. Moreover, in the absence of an agreement on the modalities for their participation there could be doubts as to which parts of the Frontex Regulation are applicable to the SAC and which not.

The Schengen Association Agreement with Switzerland was concluded the day before the adoption of the Frontex Regulation, which explains the lack of a reference to Switzerland in the recitals.[101] The Commission was given a mandate in April 2008 to negotiate the specific agreement as regards the voting rights of Switzerland and Liechtenstein.[102] The Council is expected to adopt the Decision on the signing of this Agreement shortly.[103] The provisions of the Agreement with Norway and Iceland, including voting rights, apply *mutatis mutandis* to Switzerland and Liechtenstein. In addition, the Agreement makes some provisions from the RABIT Regulation applicable.[104] Interesting is the attached Joint Declaration which states that the voting rights granted to Switzerland do not constitute "a legal or political precedent for any other field of cooperation between the parties to the Arrangement or for the participation of other third countries in other agencies of the Union. Moreover, "[i]n no circumstances may these voting rights be exercised in respect of decisions of a regulatory or legislative nature." This latter statement should however be superfluous since under the *Meroni* Doctrine Frontex itself could not dispose of powers of such nature.

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[101] See however Recital 21, RABIT Regulation. Note that the reference to Council Decision 2004/849/EC, *OJ* 2004, L368/26, is superfluous, since this Decision concerns the parts of the Schengen *acquis* falling under the Third Pillar.

[102] One could argue that since the Agreement with Norway and Iceland was adopted before the RABIT Regulation, the voting rights in relation to Article 8 apply only to the original text and not to Article 8(3), Frontex Regulation, which was added by the RABIT Regulation.

[103] COM(2009) 255 final, Proposal a Council Decision on the signing, on behalf of the Community, of the Arrangement between the EC, of the one part, and Switzerland and Liechtenstein, of the other part, on the modalities of the participation by those States in Frontex and Council Document 11819/09.

[104] Article 6(2) and the Joint Declaration on the Application of the Provisions on the Civil Liability, COM(2009) 255 final, *ibid*.

Like Romania and Bulgaria before their accession to the EU, Switzerland and Liechtenstein were permitted to attend the meetings of the Management Board in the position of observer pending the entry into force of the Schengen Association Agreement with these countries. The Agency had already concluded a working agreement with its Swiss counterpart on the basis of Article 14 of the Frontex Regulation.[105]

4. Coordination of Operational Cooperation

This section will focus on the Agency's task of coordinating joint operational activity of the Member States.[106] Here, the supposedly a-political nature of the agency is most likely to clash with the highly politicised environment in which it functions.[107] In relation to these tasks the RABIT Regulation has brought about fundamental amendments to the Agency's legal framework.[108] It illustrates well how a sense of crisis and the urge to show decisive action has resulted in legislation that is on the one hand far-reaching and on the other hand of limited practical relevance.

4.1 Practice of Joint Operations

Article 3 of the Frontex Regulation determines that the Agency shall "evaluate, approve and coordinate" Member States' proposals for joint operations and "may itself, and in agreement with the Member State(s) launch initiatives for joint operations." Although there is no minimum number of Member States mentioned, the concept of "joint" implies the involvement of at least two Member States.

Member States are in no way prevented from cooperating at operational level with other Member States, where such cooperation complements the action of the Agency.[109] In

[105] Memorandum of Cooperation on the establishment of operational cooperation between Frontex and the Kommando Grenzwachtkorps from the Eidgenössisches Finanzdepartement EFD of the Swiss Confederation, signed 4 June 2007.
[106] Article 2(1)(a),(e),(f) and (g), Frontex Regulation.
[107] Carrera, S., 'The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands' (Brussels, CEPS Working Document No. 261, March 2007), 9.
[108] Regulation (EC) No 863/2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ* 2007, L199/30 (hereinafter: "RABIT Regulation").
[109] Article 2(2), Frontex Regulation and Article 16(3) SBC. The TFEU contains a provision to this effect applicable to all "competent departments of [Member States'] administrations responsible for safeguarding national security", in Article 73.

practice, most joint operations are initiated, at least formally, by the Agency. From the Member State point of view an important reason for the involvement of Frontex would be the possibility for a financial contribution from the Agency's budget. Article 3(4) provides that the Agency my co-finance operations with grants from its budget. [110]

The applicability of the Community's financial rules, has resulted in a practice under which the Agency concludes Framework Partnership Agreements (FPAs) with the Member States and third countries, following the model of FPAs in areas such as education or development cooperation, and which form the framework for the specific grant agreements.[111] They for instance stipulate the powers of the Court of Auditors and OLAF in checking the use made of the Agency's funding. They are binding under private law. While the agreements between the Commission and third country beneficiaries normally make Belgian or Luxemburg law applicable to such agreements, the Frontex agreements are silent as to the applicable law and merely confer jurisdiction on the Court of First Instance and, in the event of appeal, the Court of Justice regarding interpretation, application or fulfilment of the agreement.[112] Since the negotiation of the FPAs is time-consuming, the Agency in the course of 2008 attempted to substitute the grant agreements with grant decisions. However, an amendment to the Community's financial rules in July 2008 excluded this possibility for Community Agencies.[113]

The general framework for the Agencies' operational activities is the Annual Programme of Work, which is adopted by the Management Board each year, before the 30th of September.[114] It lays down the expected number and estimated timing of joint operations at different external borders (land, sea, air), as well as joint return operations.[115] Within two months after its adoption the UK and Ireland can make a request to participate in the activities foreseen by the Annual Plan, upon which the Management Board shall decide whether to

[110] This could have the undesired effect of Member States pushing for a joint operation, rather than coordinating existing national patrols, for instance within the framework of the European Patrols Network (EPN). On the EPN: Frontex, 'European Patrols Network'(Frontex News, 24 May 2007).
[111] See Article 32, Frontex Regulation, read in conjunction with Article 108 of Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the General Budget of the European Communities, *OJ* 2002, L248/1, Article 75, Commission Regulation (EC, Euratom) No 2343/2002, *supra* note 75, Article 163 of Commission Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of the general Financial Regulation, *OJ* 2002, L357/1, Article 75 of the Management Board Decision of 30 June 2005 establishing the Frontex Financial Regulation applicable to the Budget of Frontex and Article 151 of the Management Board Decision of 16 December 2005 establishing the Frontex Financial Implementing Regulation.
[112] Article 238 EC.
[113] Article 75(2), Commission Regulation (EC, Euratom) No 2343/2002, *supra* note 111, as inserted by Commission Regulation (EC, Euratom) No 652/2008, *OJ* 2008, L181/23.
[114] Article 20(2)(c), Frontex Regulation, also referred to in Article 8c as "working programme".
[115] See for the 2009 Programme of Work:
http://www.frontex.europa.eu/gfx/frontex/files/justyna/programme_of_work_2009.pdf.

agree to some or all of the activities in that request. [116] In accordance with Article 20(5) of the Frontex Regulation, the Management Board must however also decide on each specific participation separately. This Decision must clearly state how the participation of either of the two Member States "contributes to the achievement of the activity in question."[117] The UK and Ireland's initial request in relation to the Annual Programme of Work does not prevent them from requesting to participate in additional joint operations during the year.

Frontex cannot organise joint operations within the territory of the UK or Ireland because the Frontex regulation does not apply there. If, as has indeed happened, either of them wishes to participate in an operation involving Schengen airports, this is only possible by conducting a parallel national operation. There will be no funding for the UK/Irish border guards participating in such coordinated activity.[118]

On the basis of Article 20(2)(d), the Management Board has adopted Rules of Procedure for the taking decisions related to the operational tasks of the Agency by the Executive Director, which have been elaborated in the Frontex Internal Rules of Procedure.[119] Every first Tuesday of the month a Directorate Meeting is held, with the Executive Director, the Deputy Director, the Directors of the Divisions, the Chief Legal Advisor and the Agency's Controller, discussing all current issues. The same people meet every second Tuesday, as the so-called Directorate Programme Board, in which proposals for programmes (grouping together of projects, operation or other activities) are made. The decision to implement activities under these programmes is made either by the Executive Director or the Director of the responsible Division, depending on the amount of money involved.[120] The Operations Divisions covers three units: Joint Operations, Risk Analysis and the FSC. The Joint Operations sub-unit is further divided into three sectors: land, sea and air borders.

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[116] Management Board Decision of 24 March 2006 on the Frontex Framework Decision on practical arrangements for UK participation in Frontex Operational Activities and Management Board Decision No 31/2007 of 15 November 2007 on the practical arrangements for participation of Ireland in Frontex Operational Activities.
A Decision regarding Ireland was adopted by the Management Board in 2007.

[117] Article 20(2)(5), Frontex Regulation. Initially this condition was rather a dead letter. At the instigation of the Commission however, which out of principle voted against the UK's participation on a number of occasions for lack of motivation of the added value, practice has now changed.

[118] However, a Frontex liaison officer going to the UK airport in order to coordinate the two parallel operations would be considered as taking part in the Frontex joint operation and would be eligible for funding.

[119] Management Board Decision No 020/2008 of 4 July 2008 laying down procedures for taking decision related to the operational tasks of the agency by the Executive Director, replacing a previous decision of 24 March 2006; Executive Director Decision 2008/67 of 12 December 2008 on the Adoption of Frontex Internal Rules of Procedure, entry force on 1 January 2009.

[120] The Executive Director has delegated his powers of authorising officer to the Director of the Operations Division for amounts with a maximum of maximum amount 500.000 EUR: Decision of the Executive Director No 2008/37 of 8 September 2008 on Delegation of Authority, applying to the Director of the Operations Division.

Once the decision to implement a joint operation has been made an operational plan is drafted in close consultation with (possible) participating Member States. It is crucial that all participating Member States agree to the plan, since it forms the blueprint for the operation and contains important information such as timing, *modus operandi*, operational area, communication channels, available technical means and human resources as well as a detailed budget. It is not signed by the participating Member States, but decided upon and signed by the Deputy Executive Director.

The so-called host Member State, i.e. the Member State on whose territory the operation takes place, is responsible for the operation. The Frontex Regulation states in Article 20(3) that "proposals for decisions on specific activities to be carried out at, or in the immediate vicinity of, the external border of any particular Member State shall require a vote in favour of their adoption by the Member of the Management Board representing that Member State."

A Frontex Coordinator manages the joint operation. S/he does not have the power to take operational decisions, but rather to coordinate cooperation on the spot between host Member State and participating Member States. Each operation has an assigned analyst, also referred to as the Intelligence Officer who, throughout the operation, gathers and provides intelligence relevant for the operation and produces a weekly risk/threat analysis.[121] The analyst is placed in the FSC, which coordinates the exchange of information during the joint operation. On the basis of operational and intelligence reports the Frontex Coordinator can propose changes to the operational plan.

In sea operations, the host Member State establishes an International Coordination Centre (ICC) and provides the ICC coordinator in charge of the centre. The ICC coordinator is also the Head of the Joint Coordinating Board (JCB), consisting of representatives of the participating Member States (National Officers, NOs) and Frontex experts, including the risk analyst. The command and control of the participating assets remains in national hands, through the NOs, who are to be given the possibility to consult with their superiors beforehand. The ICC coordinator implements the decisions related to operational activities taken by the JCB. The *tactical* command remains under the authority of each specific asset, or as directed by national authorities.

[121] Information derived from the operational plans of joint operations HERA III (Canary Island, January-February 2007) and Nautilus 2006 (Southern Mediterranean, September 2006) made (partially) accessible to the author. See also the Final Report of the External evaluation of Frontex carried out on the basis of Article 33, Frontex Regulation (COWI, Kongens Lyngby, January 2009), 34 ff.

Even where there is agreement on the operational plan, in practice problems may still arise. An evaluation report of 2008 mentioned how some participating Member States did not allow the NO/JCB to change the patrolling schedules as needed and recommended that "Member States should commit themselves in advance to an agreed organizational structure and practical arrangement when deploying their means and humans resources during Frontex coordinated activities."[122] This is however the *raison d'être* of the operational plan.

The main complicating factor is the uncertain legal status of the operational plan. In one joint operation a Member State made its participation conditional upon the conclusion of an additional bilateral agreement under public international law with the host-Member State, who did not however accept this.[123] The Member State eventually agreed to its participation, considering the host-Member State's unilateral declarations as sufficiently binding under international law. The International Court of Justice has stated that "[it] is well recognized that declarations made by way of unilateral acts (...) may have the effect of creating legal obligations".[124] Considering however the ECJ's case law in MOX Plant, the autonomy of the Community legal order and the duty of loyal cooperation would seem to prevent an action on the basis of a breach of such obligation before a court other than the European Court of Justice.[125]

One could consider the operational plan as a decision of the Agency which is binding on the participating Member States on the basis of Article 10 EC, the duty of sincere cooperation. This would allow the Commission or a Member State to bring an action under Article 226 or 227 EC respectively in case of non-compliance with the operational plan. Under the extension of the Court's jurisdiction in the Lisbon Treaty, allowing it to review also the acts of agencies of the Union, a Member State could in theory challenge an operational plan directly.[126]

In practice, English is the language used in joint operations, although legally it would be perfectly possible to opt for any other Community language. In earlier joint operations, still under the coordination of the PUC, language and communication problems were reported to

[122] Frontex, Public Except Evaluation Report Joint Operation Hermes 2008, 3.
[123] The issue concerned the responsibility for irregular migrants and asylum seekers taken on board by participating vessels. Information derived from informal discussions with Frontex staff and national officials.
[124] *Nuclear Tests* (Australia/France), *ICJ Reports* (1974), 253, para. 43 and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (Text adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10).
[125] Case C-459/03, *Commission v. Ireland* ("MOX Plant") [2006] ECR-I 4635, paras 154 and 182.
[126] Article 263 TFEU. The Treaty amendment was however inserted to provide a legal basis for making an appeal possible against decisions made by regulatory agencies with decision-making powers, such as for instance the Office for Harmonisation in the Internal Market - Trademarks and designs (OHIM).

cause major practical difficulties.[127] Poor language skills of national border guards are also mentioned as a problem in the independent evaluation carried out in 2008.[128]

4.2 The Political Nature of Frontex's Coordinating Tasks

In relation to Community agencies established in policy areas such as medicine, chemicals and food safety regulation, it has been argued that perceptions of risk are of themselves value-laden and that scientific uncertainty is the rule rather than the exception.[129] Likewise, the idea that the coordination of operational cooperation is a neutral, non-political exercise, was questioned in the previous chapter. Although the nature of the risk dealt with by Frontex, namely the occurrence of irregular migration, cannot of course be compared to that of a threat to health and safety, a similar critique can nevertheless be made in relation to Frontex's tasks.

Both the Commission and Frontex have argued that an independent risk assessment should be at the basis of the Agency' activities.[130] In other regulatory areas, such as medicine regulation, there may be a danger that powerful industries "capture" this risk assessment.[131] In the case of Frontex however, it could be the Member States that for political reasons may wish to substitute their own assessment of the situation at their external borders for that of the Agency or draw different conclusions from the risk assessment made. It may be questioned whether the Agency, represented by its Executive Director, would deny a request from a Member State or the Community Institutions even where s/he deems that there is no real urgent situation at hand or that resources ought to be deployed more urgently in other areas. Arguably the Frontex Regulation leaves this decision to the Agency, yet in practice it has not hesitated to responded swiftly and positively to requests for assistance made by Member States or the Community institutions.[132]

As an example one could point to the Hermes operation carried out in September-October 2007 off the coasts of Sardinia and the Balearic Islands, which seems to have been

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[127] House of Lords Select Committee on the EU, 'Proposals for a European Border Guard' (HL Paper 133, Session 2002-03, 29th Report, 1 July 2003), 18.
[128] COWI Report, *supra* note 121, 36.
[129] Shapiro, M., *supra* note 28, 287.
[130] House of Lords, *supra* note 140, supplementary evidence given by the Home Office, Question 47.
[131] Vos, E., *supra* note 12, 1115.
[132] In 2006, the then Commissioner for JLS, Franco Frattini responded positively to a call for additional assistance by former Italian Minister of the Interior Guiliano Amato (Commission Press Release, Brussels, 28 July 2006). Also Spain has been successful in promoting its national priorities at EU level: Hernandez I Sagrera, R., 'FRONTEX: Projection at the European level of the vision of Spain on border control' (Barcelona, Observatory of European Foreign Policy, February 2008), 2.

motivated mainly by the need for the EU and the Italian government to take decisive action in response to a steep increase in irregular landings in Sardinia in August of that year.[133] The operation had not been foreseen in the Annual Work Plan, also for the reason that the area was already covered by the Agency's coordinating activities in the framework of the European Patrols Network (ENP). The fact that no operation had been planned could either be a failure of the part of the Frontex risk analysis unit, or a conscious policy choice of giving priority to other areas. The fact is that this operation was planned on very short notice, raising doubts as to the thoroughness of its preparation and underlying risk-analysis. During the operation, with an estimated budget of 1,890,000 euro, no immigrants were intercepted at the Balearic Islands, while thirty people were apprehended attempting to reach Sardinia.[134]

Indeed, an external evaluation of the Agency carried out in 2008, concluded that "[i]t seems that Member States' political considerations in certain cases may overrule decisions based entirely on risk analysis.[135] The Frontex Internal Rules of Procedure seem to recognise this by stating that, in addition to an assessment or any other Risk Analysis product, "Council Conclusions or any other proposal that supports a Community Policy", could be at the basis of a proposal for a Frontex activity.[136]

One could on the one hand argue that Frontex in following directions from the Member States and Institutions, jeopardizes its independence and credibility, amongst the very reasons for its creation. On the other hand, the argument could be made that this evidences an awareness of the political nature of its tasks. The point could even be made that to do otherwise, would constitute an interpretation of the Frontex Regulation that runs counter to the Court's anti-delegation doctrine in the *Meroni* cases in that it would leave too wide a discretion to the Agency.[137]

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[133] See for instance: 'Amato-Frattini su sbarchi Sardegna' (*ANSA*, 29 August 2007).The first boats carrying irregular migrants had arrived in Sardinia in 2005, since 2007 this migratory route has been consolidating. Il traffico di migranti per mare verso l'Italia: Monzini, P, 'Il traffico di migranti per mare verso l'Italia' (Rome, CeSPI Working Paper 43/2008, September 2008), 39-40.

[134] It is difficult to interpret these data, since Member States and Frontex will argue that the presence of the joint operation had a deterrent effect, while other factors such as weather conditions, diversion of routes, or the fact that there simply were fewer attempts at border crossing could also have played a role. The Commission itself has stated that the "[r]esults of joint operations cannot be summarised solely in quantifiable terms.": COM(2008) 67 final, *supra* note 65, 3. Hermes 2008, with an estimated budget of 1,200,000 euro, focused only on Sardinia, yet again "immigrants was not detected in the defined operational area," while 739 immigrants reached the coasts of the island during the operational period: *supra* note 122, 2 and Frontex Press Kit Volume 2/11. Issue 1.

[135] COWI Report, *supra* note 121, 41, referring to the Nautilus operation which was approved contrary to the results from a risk assessment which had argued that the operation could attract rather than deter irregular migration. Risk assessments are confidential, but one may presume that this would be because the presence of a joint operation would render crossing the Mediterranean safer.

[136] Article 29, Frontex Internal Rules of Procedure, *supra* note 119.

[137] Case 9/56, *Meroni*, *supra* note 20, at 147-149 and Case 10/56, *Meroni*, *supra* note 20, at 169-171.

4.3 Centralised Register of Available Technical Equipment (CRATE)

Alongside the FPAs, the specific grant agreements and operational plans, there is another set of "agreements" that regulate the relationship between the Agency and the Member States.[138] These are the Memoranda of Understanding on making available technical equipment as concluded between the Agency and some thirteen Member States/SAC. Article 7 of the Frontex Regulation states that the Agency shall keep "centralised records of technical equipment for control and surveillance." This equipment belongs to the Member States, but is made available on a temporary and voluntary basis to other Member States at their request and after a "needs and risks analysis" by the Agency.

The so-called CRATE (Centralised Record of Available Technical Equipment or "toolbox"), facilitates on the one hand bilateral assistance from one Member State to another, the role of the Agency then being limited to making the information available to the Member States. On the other hand it provides Frontex with an overview of available equipment that can be deployed in joint operations, against payment from the Agency's budget. CRATE was established in 2006 and two years later contained "over a hundred vessels, around 20 aircraft and 25 helicopters and several hundreds of border control equipment such as mobile radar."[139] Nevertheless, concern has been voiced not only as to the number of items of equipment listed, but also the fact that their existence on paper does not mean that they can actually be deployed on short notice at all times.[140] The Memoranda of Understanding do not have a legally binding status and there is no legal obligation on the Member States to make the assets available. Moreover, Member States have imposed different conditions on making their equipment available. A complicating factor is that much of the equipment requires specialised staff for its functioning, which raises questions about the command and control over the means that are made available.

Article 3(1) of the Frontex Regulation states that the Agency may decide to put its technical equipment at the disposal of the Member States participating in joint operations or pilot projects, which implies that it can acquire its own equipment. The RABIT regulation has made this explicit in Article 8(3) for equipment to be used by Frontex's experts and during the deployment of the Rapid Border Intervention Teams. The Commission Communication on the evaluation and future development of Frontex stated that the potential of CRATE could be

[138] Reference to the Member States should be understood to included the SAC.
[139] COM(2008) 67 final, *supra* note 65, 4
[140] House of Lords Select Committee on the EU in its Report on 'FRONTEX: the EU external borders agency' (HL Paper 60, Session 2007-08, 9th Report, 5 March 2008), 35. See also the COWI Report, *supra* note 121, 56.

enhanced if Frontex were to acquire or lease equipment.[141] It further proposed the possibility of extending the scope of Article 7 to cover equipment for joint return operations, including aircraft.[142] The Impact Assessment of the Commission's Communication however explicitly referred to "small equipment" and not vessels, aircraft or helicopters.[143] This nuance seems to have been lost in the Communication itself and ensuing discussions.[144] The acquisition of vessels, aircrafts and helicopters would lead to difficult questions of command and control, as well as insurance. A possible solution could be found in joint-ownership by an individual Member State and the Agency, combined with the legal obligation on the Member State in question to keep the asset available for Frontex operations.

4.4 Joint Return Operations

The proposal to extend the scope of Article 7 to equipment for joint return operations, fits the more recent focus on strengthening the agency's coordinating role in this area.[145] Initially, joint return operations were not a priority. The European Parliament, which was only consulted on the adoption of the Frontex Regulation, argued that an operational structure would be premature in the absence of harmonised rules on return.[146] Nevertheless, joint return operations were already regulated to some extent by Council Decision 2004/573/EC and Council Directive 2003/110/EC.[147] Frontex's Executive Director argued that the existence of a common Framework was of little added value to the Agency's work in this area, which he rather unfortunately referred to as that of an "expedition company."[148]

With the adoption of the heavily contested Return Directive, Parliament now seems to join the Commission and Council's plea to strengthen the Agency's role in this area.[149] The

[141] COM(2008) 67 final, *supra* note 65, 4.
[142] *Ibid.*, 8.
[143] SEC(2008) 148, *supra* note 71, 32.
[144] COM(2008) 67 final, *supra* note 65, 10.
[145] See the Draft Council Conclusions on improved operational co-operation on joint return operations by air (Council Document 8246/06).
[146] See the EP Report, *supra* note 41, 31. Amendment 25 of the EP Legislative Resolution, *supra* note 85, proposed the deletion of the relevant articles.
[147] Council Decision 2004/573/EC on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, *OJ* 2004, L261/5 and Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air, *OJ* 2003, L321/26. See also Article 23, Prüm Convention on assistance with repatriation measures (Council Document 10900/05).
[148] House of Lords Select Committee on the EU, 'Illegal migrants: proposals for a common EU returns policy' (HL Paper 166, Session 2005-06, 32nd Report, 9 May 2006), 169.
[149] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ* 2008, L348/98. See point 21, EP Resolution, *supra* note 91.

Agency has already increased the number of joint return operations in which it assumes a coordinating role.[150] Article 9 provides that the Agency may use Community financial means available in the field of return. It has interpreted this provision so as to include the possibility to co-finance joint return operations. This interpretation is doubtful. Under the European Return Fund, the role of the Agency is in any case limited to "ensure that the conditions for an effective coordinated return effort between Member States are met, whilst leaving the implementation and organisation of the joint return operations to the competent national services.[151] The House of Lords in its report on Frontex has argued on a more principled basis against the enhanced role of Frontex in the field of return, on the ground that in an earlier inquiry it found that generally voluntary return is to be preferred over enforced compulsory return, not merely for being more humane, but also more cost-effective.[152]

4.5 "Emergency Situations"

Article 64(2) EC provides that the Council may "in the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries" adopt provisional measures for a duration not exceeding six months for the benefit of the Member States concerned.

Already in 2002, the Commission mentioned the idea of creating a pool of national staff which could in the event of a crisis be mobilized at short notice.[153] The reference to crisis situations in the Frontex regulation was however limited to Articles 2(e) and 8 which provide that Member States may ask the Agency for assistance in cases of "circumstances requiring increased technical and operational assistance when implementing their obligations with regard to control and surveillance of external borders."

Only a month after the adoption of the Frontex Regulation, the Hague Programme invited the Commission to present in 2005 a proposal for the creation of teams of national experts that could "provide rapid technical and operational assistance to Member States requesting it, following proper risk analysis by the Border Management Agency and acting

[150] The Frontex Annual Programme of Work 2009 foresees 8-10 joint return operations, the same as in 2008, compared to 5-6 in 2007.
[151] Recital 28, Decision No 575/2007/EC establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme 'Solidarity and Management of Migration Flows', *OJ* 2007, L144/45. Under Article 6(2)(g) Community Actions may fund the development and updating of a common handbook in the area of return.
[152] House of Lords, *supra* note 140, 25.
[153] COM(2002) 233 final, Commission Communication 'Towards Integrated Management of the External Borders of the Member States of the European Union', 21.

within its framework." The European Council Conclusions of 15 and 16 December 2005 called upon the Commission to present a proposal by Spring 2006, which eventually it did by mid-July 2006. It may come as no surprise that this was at exactly the time of the year in which the arrival of irregular migrants by sea reaches peak levels because of more favourable weather conditions.[154] The Regulation was adopted on the first reading, less than a year after the proposal was made and less then two years after the agency had started its work. It evidences the sense of crisis surrounding the problem of irregular migration by sea and the importance attributed to this by the various actors in the legislative process.[155]

The Regulation establishes "a mechanism for providing rapid operational assistance for a limited period to a requesting Member State facing a situation of urgent and exceptional pressure, especially the arrival at points of the external borders of large numbers of third-country nationals trying to enter the territory of the Member State illegally, in the form of Rapid Border Intervention Teams."[156] It forms a good example of how migration and border management are dealt with from a control-based perspective without sufficient regard being given to questions of international protection and asylum. It is telling that at no point in the legislative process the question seems to have been asked under which circumstances such a situation would be most likely to arise.

In general the mass influx of third country nationals will occur in the event of a natural or human disaster provoking the displacement of large groups of people. In such a situation however the entry of those people could hardly be considered as illegal. Moreover, it would require not border guards, but aid workers and asylum experts instead. The Commission's proposal for an Asylum Support Office, which would include the creation of asylum expert teams, seems to form a careful recognition of this standpoint.[157]

Commonly, when a situation of irregular arrivals is characterised as an emergency, reference is made to situations in which receiving authorities are overwhelmed by the number of third country nationals and reception facilities are inadequate for their reception. Therefore, a solution should consist not (only) in increased border control, but in enhancing the reception

[154] COM(2006) 401 final, Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism.
[155] See also the Conclusions of the European Council meeting of 14-15 December 2006 calling upon the Community legislator to reach "rapid agreement" on the proposal, point 24.c. This speed may not have contributed to the quality of the drafting of the Regulation, which is rather poor. One example is that the definition of external borders in Article 1a(1), Frontex Regulation is different from the one in Article 2(2) SBC.
[156] Article 1, RABIT Regulation.
[157] Articles 13-21, COM(2009) 66 final, *supra* note 67.

capacity of the Member States' territories concerned, providing trained staff and an adequate infrastructure.[158]

4.6 The RABIT Mechanism

While the Frontex Regulation left it to the Management Board and the Agency itself to develop procedures for decision making on joint operations, the RABIT Regulation introduced precise rules into the Frontex Regulation, not only for the procedure for the decision to deploy a RABIT (Article 8d), but also for the operational plan (Article 8e), the reimbursement of costs (Article 8h) and the role of the Frontex coordinating officer (Article 8g). These rules often differ from those adopted by the Management Board applying to joint operations.

The Executive Director immediately informs the Management Board of a request by a Member State. Member States should communicate the number, names and profiles of border guards from their national pool which they are able to make available within five days to act as members of a RABIT. The Executive Director shall decide on the request within five days, taking into account Frontex's risk analyses, as well as any other relevant information. S/he may also send Frontex experts to the requesting Member State to assess the situation. The decision must contain the reasons on which it is based and must be notified to the Management Board and the requesting Member State. In theory, after the entry into force of the Lisbon Treaty, a requesting Member State should be able to challenge the denial of a request before the Court of Justice under Article 263 TFEU.

If positive, the Agency draws up an operational plan together with the requesting Member State, detailing the conditions for the deployment of the teams as laid down in Article 8e of the Frontex Regulation. Amendments to the operational plan require the agreement of both the Executive Director and the requesting Member State. The Agency shall inform the national contact points of the number and profiles of border guards needed. There is no time set within which an operational plan has to be agreed upon, but within five days of its approval the teams must be deployed.

Member States are required to make border guards available for deployment in RABIT teams "unless they are faced with an exceptional situation substantially affecting the

[158] The Parliamentary Assembly of the Council of Europe called upon Contracting Parties to "close unsuitable reception and detention centres, and construct new centres which are adequate and appropriate for the length of time irregular migrants and asylum seekers are to be detained": Resolution 1637 (2008), point 9.7.

discharge of national tasks."[159] This compulsory element was added by Parliament and referred to as "mandatory" or "compulsory solidarity."[160] However, in the light of Article 64(1) EC, which states that Title IV EC does not "affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security", the question whether such an exceptional situation exists is left to be assessed by the individual Member States.[161]

The members of the RABIT are drawn from a so-called "Rapid Pool", which is the total number of Member State border guards available who fulfil a certain profile, in terms of working experience, skills – such as language skills - and competences. This profile, as well as the overall number of the pool has been established by a decision of the Management Board, requiring a two-thirds majority.[162]

During deployment of the teams, instructions to the teams shall be issued by the host Member State in accordance with the operational plan.[163] The Executive Director appoints one or more members of the Frontex staff as Coordinating Officer who shall act as an interface between the Agency, the host Member State and the other participating Member States. Through the Coordinating Officer Frontex may express its views on the instructions of the host Member State, which is obliged to take these views into consideration.[164]

Unlike with joint operations, the Agency covers in full the costs of the deployment of a RABIT ranging from border guards' health care to a daily subsistence allowance, also including accommodation. The Management Board has adopted a decision on the rules concerning the payment of the daily subsistence allowance of members of the teams.[165] A special statement added to the RABIT regulation provides that if the Agency does not have the financial means in its budget, "all possibilities to ensure funding should be explored."[166] The Commission should see whether funds could be redeployed under Article 23 of the

[159] Article 8b(2) and Article 8d(8), Frontex Regulation.
[160] 'Rapid response teams to tackle illegal immigration' (EP Press Release, 26 April 2007).
[161] Both Finland and Poland raised questions during the legislative process as regards the compatibility of this article with Article 64(1) EC (Council Document 8456/07).
[162] Article 4(2), RABIT Regulation. See the Management Board Decision No 10/2007 of 31 August 2007 on the profiles and the overall number of border guards to be made available for the Rapid Border Intervention Teams (Rapid Pool).
[163] Article 5(1), RABIT Regulation.
[164] Article 5(2), RABIT Regulation.
[165] Management Board Decision No 9/2007 of 27 August 2007 detailing the rules concerning the payment of the daily subsistence allowance to members of the Rapid Border Intervention Teams during deployment and border guards of the Rapid Pool who are participating in training and exercises. Although Article 3(1) of this Decision provides that daily subsistence allowances are to be paid at the level of the home Member State, the Management Board has pronounced itself in favour of harmonising daily subsistence allowances in the future.
[166] Statement by the European Parliament, the Council and the Commission, annexed to the RABIT Regulation.

Financial Regulation, or in case a decision of the budgetary authority would be required, initiate a procedure under Article 24.[167]

Apart from training exercises in accordance with Article 8c of the Frontex Regulation, there have to date been no deployments of RABITs. The RABIT Regulation was clearly adopted with the situation of irregular migration by sea in mind. This is clear for instance from the reference made to the proposal in the Council's Conclusions on the implementation of the Programme of measures on illegal immigration across the maritime borders and the further reinforcement of the Southern Borders.[168] Recital 18 of the Regulation states that it shall be applied with full respect for obligations arising under the international law of the sea, in particular as regards search and rescue.

The nature of operations at sea however makes the deployment of these teams highly implausible. Firstly, the RABIT mechanism deals with speedily making available human resources, not technical means and/or equipment, for which purpose there is the CRATE. In the case of operations at sea such technical means, in particular vessels, are indispensible and unless the supporting Member State is located nearby, they are difficult to quickly relocate. Secondly, vessels, as wells as aircrafts, always remain under the tactical command and control of the Member State of the flag. Especially if the operational area of the joint operation is located outside Member State territory, *i.e.* on the high seas or in third country territorial waters, there is no point in making the rules of the host-Member State applicable to the deployment of the RABIT, as on board the rules of the flag state will apply. Member States have been reluctant to actually deliver the means they have pledged, or have put restrictive conditions on their use, partly also resulting from the uncertainty as to the responsibility for irregular migrants and/or asylum seekers they would take on board.[169]

Even if the practical importance of the RABIT regulation may have been limited, the wider importance for the development of the EU's management of the external borders cannot be underestimated. Although RABIT members remain national border guards of the home Member State, as specifically stated, the Regulation has created an "on call" force of 629 border guards which may well be considered as the forerunners of a more permanent

[167] Council Regulation (EC, Euratom) 1605/2002, *supra* note 111.
[168] Draft Council Conclusions evaluating the progress on the implementation of the Programme of measures to combat illegal immigration across the maritime borders (Council Document 15087/04), 5 and Draft Council Conclusions on reinforcing the southern external maritime border (Council Document 13559/06), 3.
[169] The Netherlands for instance has limited the deployment of the navy vessel it has pledged to the territorial waters of the Member States: 'Nederland levert fregat voor Frontex's (*Volkskrant*, 26 January 2008).

European Corps of Border Guards.[170] The blue EU/Frontex bracelet that visiting officers will be required to wear can be seen as the symbolic expression of this.[171]

In addition, in parallel to the RABIT pool, the Agency has developed the concept of Frontex Joint Support Teams (FJST). These teams are drawn from a pool of the same composition as the RABIT pool. They may be deployed in situations such as those described in Article 8(1) in which Member States require increased assistance, but there has not yet been any case of emergency.[172] They are trained specifically to participate in Frontex operations and Member States are asked to give priority to these border guards when selecting personnel for participation in joint operations.[173]

4.7 Tasks and Powers of Guest Officers and Members of the RABITs

Perhaps of even greater significance than the creation of the RABIT pool, is that the RABIT Regulation has regulated the tasks and powers of visiting border guards or "guest officers", that is the border guards from one Member State that participate as members of a RABIT, but also those that participate in a joint operation. This regulation of tasks and powers has received very little attention so far.[174] The Frontex Regulation initially did not address the question of the tasks and responsibilities of border guards from one Member State being deployed in another. The Commission Communication of 2002 on the integrated management of the external borders had already made it clear that:

> "The main difficulty to be overcome in establishing a European Corps of Border Guards is connected with conferring the prerogatives of public authority on staff of the European Corps who do not have the nationality of the Member State where they are deployed. This is a fundamental question on constitutional grounds."[175]

Articles 7 and 47 CISA only provided for the exchange of liaison officers, which - it stated specifically - "shall not be empowered to take independent police action." Under the Frontex

[170] Article 7(1), RABIT Regulation.
[171] Article 10(4), Frontex Regulation; Article 6(4), RABIT Regulation.
[172] Beuving, L., 'FRONTEX: its role and organisation' (Strasbourg, SECURINT Working Paper No. 8), 13.
[173] See Executive Director Decision No 2008/24 dated 23 May 2008 on the organizational structure of Frontex Joint Support Teams. COWI Report, *supra* note 121, 53.
[174] It is telling that only in some of the latest drafts the "regulation of tasks and powers" was included in the title of the proposal.
[175] COM(2002) 233, *supra* note 153, 22

Regulation, it was assumed that the border guards were acting under the laws of the host Member State.[176]

The proposal for the RABIT Regulation was relatively modest in comparison to the Regulation that was finally adopted. The Commission had proposed to allow guest officers to exercise a limited number of task, enumerated in Articles 7 and 8 of the proposal. It followed an external study it had commissioned, which concluded that:

> "Police officers in charge of border management have, in general, much broader prerogatives related to the exercise of public authority as police officers are responsible for preserving public order, promoting public safety and preventing and detecting crime. This makes it more difficult to accomplish a complete integration of "guest officers" with "similar" powers…"[177]

The study showed that border guards throughout the EU felt not only the need for a clear legal framework, but were also well aware of the growing expectations for joint action.[178] It was rightly pointed out that trust and good personal relations cannot act as a substitute for legal certainty. It suggested that specific minimum powers be given to visiting border guards, for the limited period of time of joint operations, which would allow them to actively support host officers without exercising discretionary powers.[179]

The tasks envisaged by the Commission proposal included: to check travel documents, carry out interviews, search means of transport, participate in border patrols and "prevent people from crossing illegally the external border of the host-Member State." The latter task especially was very broadly formulated and potentially encompassed far-reaching discretionary powers.[180]

In the SCIFA however, much to the satisfaction of Frontex, an even further reaching approach was taken. The proposal was amended so as essentially to equate guest officers with national border guards. Under the most far reaching draft version of the Regulation, dating from 21 February 2007, guest officers would have had the capacity to perform all tasks and exercise all powers for border checks or border surveillance in accordance with the Schengen Borders Code (SBC), "*as well as those* that are necessary for the realisation of the objectives of that Regulation."[181] By March, this potentially very broad scope had been somewhat

[176] This was also pointed out by the House of Lords Select Committee on the EU, *supra* note 127, 19-20.
[177] 'Study on conferring executive powers on border officers operating at the external borders of the EU' (Unisys, Brussels, April 2006), 8.
[178] *Ibid*, 13.
[179] *Ibid*, 14.
[180] This was also noted by Lord Grenfell, Chairman of the Select Committee on the EU in his letter requesting additional information regarding the RABIT Proposal to the UK government dated 18 October 2006.
[181] Council Document 6613/07.

limited in what would be the final version, by stating that guest officers would have the capacity to perform all tasks and exercise all powers for border checks or border surveillance in accordance with the SBC, "*and* that are necessary for the realisation of the objectives of that Regulation," formulating a cumulative rather than alternative requirement.[182]

The explicit reference to the SBC, has not only made the potential tasks of visiting border guards very broad, it has also rendered the participation of the UK and Ireland in the Agency's activities much more difficult. The new rules on tasks introduced by the RABIT Regulation do not automatically apply in relation to the UK and Ireland. Moreover, the Regulation makes explicit reference to the SBC, in which the UK and Ireland do not, and have no desire to, participate. The same problem exists in relation to the rules on criminal and civil liability. As a result there will be a continuing uncertainty as to the position of UK and Irish officers in joint operations. Although the RABIT Regulation had not yet been adopted when the ECJ ruled on the exclusion of the UK and Ireland from full participation in Frontex, in relation to the Frontex Regulation, the Court was probably right in arguing that participation of the UK in a Schengen developing measures presupposed the prior acceptance of those parts of the Schengen *acquis* which were being developed.[183] Since the adoption of the RABIT Regulation it would be difficult to consider the Frontex Regulation a "self-standing" measure.[184]

In the exercise of their powers, the guest officers must comply with Community law and the national law of the host Member State. They may only perform their tasks under instructions from and, *as a general rule*, in the presence of border guards of the host-Member State. Although the exercise of powers in the absence of a border guard from the host-Member State would have to be considered an exception and therefore interpreted narrowly, it is unclear what room is left for guest officers to act independently from the instructions of the host Member State.

Most far-reaching are the provisions on the carrying of weapons and the use of force. Oddly enough, none of the Member States in the Council seems to have raised national concerns of a constitutional nature here. Guest officers may carry their service weapons, ammunition and equipment in accordance with the national law of the home Member States. The host Member State may however prohibit the carrying of those weapons, ammunition and

[182] Council Document 6966/07.
[183] Case C-77/05, *UK v Council* [2007] ECR I-1145, para. 68 and Case C-137/05, *UK v Council* [2007] ECR I-11593, para. 50.
[184] See the discussion in Chapters IV and VII.

equipment that it does not allow for its own border guards.[185] Guest officers are authorised to use force, including service weapons, ammunition and equipment on the following conditions: 1) consent of both home and host-Member State, 2) presence of border guards of the host Member State 3) in accordance with the law of the host-Member State. What is not clear is whether this consent needs to be given in every particular instance. Finally, the host Member State may authorise guest officers to consult its national and European databases which are necessary for border checks and surveillance. The guest officers shall consult only those data which are required for performing their tasks and exercising their powers.[186]

The Frontex Regulation states that Member States should, in advance of an operation, state which weapons, ammunitions and equipment they allow visiting border guards to carry, as well as to which of its databases they will grant access. Under Article 8e(d) this information shall also be included in the operational plan. Since it would be against the principle of non-discrimination if a Member State were to grant different access rights to different Member States, this information could and is indeed already being collected by the Agency. Moreover, the Agency has been collecting information on the Member States' laws and regulations on the use of force and legitimate self-defence. It is however clear that these rules require translation, explanation and interpretation and can therefore not easily be summarised. One can therefore validly question to what extent it is feasible to give visiting border guards a sufficient understanding of the host Member State's rules during the briefing for a joint operation or the deployment of a RABIT.

4.8 Accountability of visiting Border Guards

In the previous chapter it was already pointed out that the non-binding nature of operational activities vis-à-vis third parties does not mean that in the course of such activities rights and obligations cannot arise from the conduct of national law enforcement personnel. Since the RABIT Regulation has given visiting border guards the possibility to use coercion, it has also

[185] Practical problems have arisen in relation to the transportation of weapons, since the RABIT Regulation does not contain a specific provision as that of Article 9 of the EU Status of Forces Agreement under the Second Pillar, authorising the transit and temporary deployment of military staff and their equipment within the territory of a Member State subject to the agreement of the competent authorities of the concerned Member States, *OJ* 2003, C321/6.

[186] Note that this is a case of mutual recognition comparable to for instance lawyers under Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, *OJ* 1998, L 77/36. The difference is however the application of this principle to the exercise of public authority.

addressed the question of their civil and criminal liability. It regulates liability regarding acts committed both by them and against them. The articles on civil liability provide that the host Member State shall be liable in accordance with its national law for damages caused by visiting border guards during their operations. Although it is not surprising that the law of the host Member State applies to these situations, in accordance with the adage "*lex locus delicti commissi*", it is significant that the host Member State takes responsibility for the acts of border guards who are not its own, thereby equating them with its own border guards. Where this damage is the result of gross negligence or wilful misconduct, the host Member State can approach the home Member State for reimbursement of these damages. At the same time Member States waive all claims against each other for damages incurred during the operations. In case of a dispute the ECJ will have competence. The Agency is liable for the damages caused by its equipment, except in cases of gross negligence or wilful misconduct.[187]

As regards criminal liability, the visiting border guards are to be treated in the same way as the border guards from the host-Member State. Here again the visiting border guards are equated with border guards from the host-Member State. Presumably this means that any aggravating or mitigating circumstances relating to their status as public officials would also apply, which is yet another example of the impossibility of insulating national criminal law from the Community's law making powers.

The article on criminal liability is different from its counterpart in the EU standard Status of Forces Agreement (SOFA) under the Second Pillar, which deals with criminal offences committed by military staff. Under the EU SOFA, the sending Member State has primary jurisdiction over offences against its own personnel and arising out of any act or omission done in the performance of official duty. The receiving Member State has primary jurisdiction over all other offences.[188]

Recital 17 of the RABIT Regulation states that it respects fundamental rights and shall be applied in accordance with the Member States' obligations as regards international protection and *non-refoulement*. Recital 22 of the Frontex Regulation makes a similar reference to fundamental rights and the Charter of Fundamental Rights of the European Union. Article 2 of the RABIT Regulation, provides that it shall apply without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*. Article 5(2) contains the obligation for RABIT members to fully respect human dignity in the exercise of their duties and to comply with principles of proportionality

[187] See also Article 19, Frontex Regulation, for the Agency's contractual and non-contractual liability.
[188] Article 17, EU SOFA, *supra* note 185.

and non-discrimination. As was discussed in the previous chapter it is unclear to what extent these articles fall within the jurisdiction of the ECJ. Their very inclusion however would support the argument that the jurisdiction of the Court should extend to the activities of national border guard authorities in the context of joint operational activity, since otherwise these articles would be devoid of content.

The obligation to wear a bracelet is not merely symbolic, it also functions as an important means of identification. So does the accreditation document that is issued on the basis of Article 8 of the RABIT Regulation and Article 10a of the Frontex Regulation and which visiting border guards must carry with them at all times. The document contains the name, rank and photo of the border guard, as well as the rights s/he has in accordance with the Frontex/RABIT Regulation. The document is issued in the official language of the host Member State and another official language of the EU Institutions. Accountability towards third country nationals would be increased if the (main) languages of the neighbouring third countries were also to be included.

5. Frontex's Accountability

The rules on civil and criminal liability of national border guards are of great importance for the accountability of joint operational activities coordinated by Frontex. They relate however to the responsibility of national border guards participating in joint operations, rather than to the accountability of the Agency itself. Frontex, being a Community agency, is subject to a number of accountability mechanisms, most of which are laid down in its founding regulation and which govern its overall functioning, including the coordination of operational activities.

As Everson has noted, the compatibility of independent agencies with the EC Treaty, ultimately rests upon their accountability.[189] Through accountability mechanisms the respect for the institutional balance of power, understood as a system of checks and balances rather than as a system of separation of powers, can be ensured.[190] Accountability here will be used in a broad sense, encompassing not merely *ex post*, but also *ex ante* means of control.

The Community legislator has put in place oversight mechanisms to ensure that Frontex will act in compliance with its founding regulation. In terms of principal-agent theory, these controls aim at reducing "agency slack": shirking (or bureaucratic drift) and

[189] Everson, M., 'Independent Agencies: Hierarchy Beaters?' 1 *ELJ* 2 1995, 198.
[190] Case 9/56, *Meroni*, *supra* note 20, at 147-149 and Case 10/56, *Meroni*, *supra* note 20, at 169-171. See: Yataganas, X.A., *supra* note 26, 38.

slippage.[191] These agency losses are generally minimized when principal and agent share common interests and where the principal is informed of the agent's activities and results.[192] Oversight mechanisms either monitor the agency's activities directly and in a centralised manner ("police patrol" monitoring), or allow third parties to signal administrative malpractice ("fire alarm" monitoring).[193]

Accountability is closely related to responsibility, transparency, answerability and responsiveness, and these terms are often used interchangeably. The Commission in its White Paper on European Governance mentioned transparency alongside accountability as one of the five principles underlying good governance.[194] Frontex draws its formal legitimacy from its adoption by the Community legislator on the legal bases provided in the EC Treaty. Accountability mechanisms however serve to enhance its social legitimacy, that is "the extent to which the allocation and exercise of authority commands general acceptance."[195]

5.1 Accountability through the Founding Regulation

Many of the advantages of agencies flow from their (semi-) independence. The Community legislator therefore must find a balance between the agency's independence from undue influence and making it answerable to the EU institutions, the Member States and the public, so that "no one controls the agency, but that at the same time the agency is under control".[196] The constituent regulation of an agency should lay down not only monitoring mechanisms, but also provisions that guarantee its independence.[197]

The Frontex Regulation in Article 1 and 2 stipulates the Agency's objectives and tasks. The fact that new pieces of legislation have amended and added to the powers of the

[191] McCubbins, M. and Page, T., 'A Theory of Congressional Delegation', in: McCubbins, M. and Sullivan, T. (Eds), *Congress: Structure and Policy* (New York, CUP, 1987), 410-411. In the case of shirking, the agency pursues policy goals differently from that of the principal. In the case of slippage, incentives or constraints flowing from the structure of the delegation cause the agent to act differently from the principal's intent: Pollack, M., *supra* note 5, 26.
[192] Lupia, A., *supra* note 7, 3376.
[193] McCubbins, M. and Schwartz, T., 'Congressional Oversight Overlooked: Police Patrols versus Fire Alarms' 28 *AJPS* 1 (1984), 166 and McCubbins, M. and Lupia, A., 'Learning from Oversight: Fire Alarms and Police Patrols Reconstructed 10 *JLEO* 1 (1994), 96-125.
[194] COM(2001) 428 final, Commission White Paper on European Governance, 10.
[195] The distinction between formal and social legitimacy is made by Arnull, A., 'Introduction: The European Union's Accountability and Legitimacy Deficit', in: Arnull, A. and Wincott, D. (Eds), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), 3-4.
[196] Everson, M., *supra* note 189, 190.
[197] *Ibid.*, 199.

Agency, means that the agency's powers are now to be found over different legislative instruments which makes it more difficult to establish its responsibilities.

Article 15 gives the Agency legal personality and grants it formal independence in technical matters, which it however does not define and which, as we saw earlier, may be problematic considering the highly politicized nature of its tasks. The terms of office of the Members of the Management Board, its Chairman and the (Deputy) Executive Director are fixed, and renewable once. A proposal to add that renewal would only take place after an evaluation, taking into account the results from the past few years and the tasks for the coming year, was proposed for all agencies but has never been adopted.[198]

Article 26 of the Frontex Regulation prescribes the procedure of appointment of the (Deputy) Executive Director. Vacancy of the post of Executive Director shall be made public amongst others, in the Official Journal. The (Deputy) Executive Director is appointed "on the grounds of merit and documented administrative and management skills, as well as his/her relevant experience in the field of management of the external borders." The Executive Director shall neither seek nor take instructions from any government or other body.[199] Although not explicitly stated, the same must be assumed for the Deputy Executive Director. The Regulation itself does not require staff to make a declaration of interests, but the Agency does have a practice of requiring such declaration. This should be considered particularly important in relation to interests in the security technology industry.[200]

5.2 Accountability to the Member States and the Community Institutions

Through their representatives in the Management Board, the Commission and the Member States exercise control over the Agency's policy and the implementation thereof. The Management Board may exercise disciplinary control over the (Deputy) Executive Director. The Commission representatives in the Management Board are likely to have considerable influence over their Member State counterparts, due to their more intensive contacts with the

[198] COM(2005) 190 final. This proposal aimed to set a harmonised term of office for the Executive Directors of all Community agencies to five years - which was already the case for Frontex - and add the requirement of an evaluation prior to renewal.
[199] Article 25(1), Frontex Regulation.
[200] Recall Frontex's task of following up on the development of research relevant for the control and surveillance of external borders, Article 2(1)(d), Frontex Regulation.

Agency and the resulting informational imbalance.[201] It may moreover be questioned to what extent the Members of the Management Board actually answer to their respective governments, rather than act as a community of like-minded professionals.[202] Majone has argued that the inclusion of an agency in a network will force it to uphold its professional standards and policy commitments, in ensuring its reliability vis-à-vis the other actors.[203] However, here again the danger exists that once a level of mutual trust and a common approach have been established, the network starts functioning as a single actor, being answerable only to itself.[204]

The European Parliament monitors the activities of the Commission by asking it oral and written questions. The Frontex Regulation states in Article 25(2) that both the Parliament and the Council may invite the Executive Director of the Agency to report on the carrying out of his/her tasks.[205] The refusal by Frontex to attend a public hearing organised by the LIBE Committee, "Tragedies of Migrants at Sea" on 3 July 2007, caused considerable discontent amongst some Members of the European Parliament.[206] It shows that the Agency did not consider this provision as constituting an obligation. A more binding formulation would be preferable, strengthening the possibility for the Parliament and Council to scrutinize Frontex's work.

Considering its limited responsibility for and powers of direct control over the Agency, the Parliament's powers to censure the Commission do not constitute an effective means of control over the Agency.[207] In case of serious structural problems, the Parliament could consider the setting up of a Commission of inquiry, also as a means of pressuring the Management Board to exercise its powers of control.[208] Probably the most important means of control over the Agency is through the "power of the purse." Frontex's revenue consists of a subsidy from the Community entered in the Commission section of the EU's general budget,

[201] See Busuioc, E., "Autonomy, accountability and control: the case of European agencies (Paper presented at the 4th ECPR General Conference, Pisa, 5-8 September 2007), 17-18.
[202] The same has been observed in relation to the members of the Comitology Committees: Joerges, C. and Neyer, J., 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3 *ELJ* 3 (1997), 291.
[203] Majone, G., 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union', *Eipascope* 2 (1997), 4. See also Majone, G., 'The new European Agencies: regulation by information', 4 *JEPP* 2 (1997), 271-272.
[204] Harlow, C., *Accountability in the European Union* (Oxford, OUP, 2002), 184. It should be noted however that whereas in the first few years of its existence the Programme of Work and General Report were adopted without much ado by the Management Board, it recently seems to be taking a more critical approach.
[205] This is a provision that can also be found in the constituent regulations of a number of other regulatory agencies, such as the European Network and Information Safety Agency (ENISA), the European Railway Agency (ERA) and the European Aviation Safety Agency (EASA).
[206] See also House of Lords, *supra* note 140, 30.
[207] Article 201 EC.
[208] Article 193 EC.

a contribution from the SAC, fees for services provided, as well as any voluntary contribution from the Member States, including the contribution from the UK and Ireland for their participation in the Agency's activities.[209] The main source of income is however the Community subsidy.[210]

Article 29 of the Frontex Regulation lays down the procedure for the adoption of the Agency's budget. The Management Board adopts a draft budget ("estimate") for the following year and forwards it to the Commission by 31 March. The Commission then forwards this draft to the budgetary authority (i.e. the Parliament and the Council), together with the EU's general preliminary budget. The preliminary budget includes under a separate heading the estimates the Commission deems necessary for the Agency's establishment plan (number of posts by grade and by category), as well as the amount of the subsidy. In drawing up these estimates the Commission can exercise an indirect influence over the Agency.[211] Since the subsidy constitutes non-compulsory expenditure, the Parliament can exercise an important *ex-ante* control over the agency's functioning.[212] Parliament may propose amendments in relation to non-compulsory spending and takes the final decision on these amendments at last reading. [213]

Parliament has used its powers in October 2008 to increase Frontex's budget by 30 million euro, but at the same time putting 30% of the administrative budget in reserve in order to increase its "accountability and effectiveness."[214] One may question how effective it is to freeze part of the administrative budget, whilst increasing its operational budget. First of all, the Agency already has to cope with problems with the recruitment of staff.[215] Second, much of the effectiveness of the Agency's operations depends on Member States' willingness to participate and contribute to joint operations.[216]

The Agency's budget is adopted by the Management Board and becomes final after the adoption of the general Community budget. Where necessary the Agency's budget is adjusted in accordance with the general budget. The Management Board is bound to inform the budgetary authority when it plans to implement projects with significant financial

[209] Article 29(1) and Article 20(5), Frontex Regulation.
[210] For instance, under the Agency's 2008 budget, the Community subsidy accounted for 96 percent of the total.
[211] Busuioc, E., *supra* note 201, 17-18.
[212] Non-compulsory expenditure is expenditure which does not necessarily result from the Treaties or from acts adopted in accordance with them.
[213] Article 272(4) read in conjunction with 272 (6) EC.
[214] House of Lords, *supra* note 140, 28. See EP Resolution of 13 December 2007 on the draft general budget of the European Union for the financial year 2008 as modified by the Council (P6_TA(2007)0616).
[215] COWI Report, *supra* note 121, 72. See also: 'Staff woes hit EU border agency' (*BBC News*, 26 January 2007).
[216] See also the COWI Report, *ibid*, 36 and COM(2008) 67 final, *supra* note 65, 4.

implications for the funding of its budget, in particular any projects relating to property. Either branch of the budgetary authority has the right to forward an opinion to the Management Board within six weeks of the notification.[217]

5.3 Judicial Accountability

Judicial accountability refers to the possibility of holding the Agency accountable through resort to the courts. The difficulty of judicial control being exercised over operational activity has been pointed out both in this and the previous chapter. In relation to Frontex's activities there are different reasons why an "act" of the Agency may not be amenable to judicial review.

First, the act may in reality be a preparatory action for a Commission decision and as such have no legal effect.[218] This would be the case where the Agency determines the weighing factors for the allocation of money under the EBF.[219]

Second, the act may be attributed to a national border guards rather than to the Agency, which would be the case during joint operational activity. Here the RABIT Regulation has brought about important improvements by regulating the civil and criminal liability of visiting border guards, granting the national courts of the host Member State jurisdiction. Under Article 19 of the Frontex Regulation the ECJ has jurisdiction in relation to disputes about the contractual and non-contractual liability of the Agency, but in the case of the latter the damage would actually have to be imputable to the Agency.

Lastly, where a decision of the Agency does have legal effects, for instance where it refuses to co-finance a joint operation or it denies a request for the deployment of a RABIT, Article 230 EC would not allow for judicial review since agencies are not included amongst the institutions and bodies whose acts may be challenged before the ECJ.[220]

A recent judgment of the Court of First Instance (CFI), if not confined to the specific field of public procurement, may open up the way for judicial review by the Court. In that case, the CFI recalled that the cancellation of a tender procedure by the European Agency for

[217] Article 29(11), Frontex Regulation.
[218] Cf. with the preparatory work done by the EMEA, a Community body in the field of pharmaceuticals regulation: Case T-326/99, *Fern Olivieri v. Commission and EMEA* [2003] ECR, II-6053, para. 53.
[219] Article 15, EBF.
[220] See the order in Case T-148/97 *Keeling* v. *OHIM* [1998] ECR II-2217, para. 32 and Case C-160/03, *Spain v. Eurojust* [2005] ECR I-2077, paras 36-37. A similar problem would apply to the application of Article 232 EC on a failure to act.

Reconstruction adversely affected the applicant, bringing about a distinct change in his legal position."[221] Referring to the ECJ's case law in *Les Verts* the CFI recalls that the Community is based on the rule of law and that the general scheme of the Treaty is to make a direct action available against all measures adopted by the institutions which are intended to have legal effects.[222] Excluding review of the Court on the basis of the fact that Agencies are not listed in Article 230 EC would deprive the applicant of an effective legal remedy. The Court emphasises that the EAR takes decisions that would otherwise have been taken by the Commission, and "cannot cease to be acts open to challenge solely because the Commission has delegated powers to the EAR."[223] This reasoning could be less easily transposed to the case of Frontex, where such a direct link cannot readily be established. Nevertheless, the entry into force of the Lisbon Treaty would seem to confirm this extension of jurisdiction to acts of agencies of the Union intended to produce legal effects *vis-à-vis* third parties in Article 263 TFEU.

5.4 Financial Accountability

The general Financial Regulation which lays down the rules for the establishment and implementation of the general Community budget refers expressly to agencies.[224] Where the Commission chooses to implement the budget through agencies ("indirect centralised management"), it must ensure itself that mechanisms are in place that ensure the accuracy and transparency of financial transactions, such as procedures for procurement and grant-award, internal control, independent external audit.[225] On the basis of Article 185(1) of the Financial Regulation the Commission has adopted a Framework Financial Regulation for bodies set up by the Communities, having legal personality and receiving grants charged to the Community budget.[226] Article 185(1) states that the financial rules applicable to the these bodies may not depart from the Commission's Financial Implementing Regulation, unless specifically required for the Agency's operation and with the Commission's prior consent.[227] The Management Boards shall, as far as necessary, adopt detailed rules for implementing the

[221] Case T-411/06, *Sogelma v. AER* [2008] ECR II-0000, *nyr*, para. 38.
[222] *Ibid.*, para. 36.
[223] *Ibid.*, paras 39-40.
[224] Article 54, Council Regulation (EC, Euratom) 1605/2002, *supra* note 111.
[225] Article 56(1), *ibid*.
[226] Commission Regulation (EC, Euratom) No 2343/2002, *supra* note 75.
[227] Commission Regulation (EC, Euratom) No 2342/2002, *supra* note 111.

financial regulation of the Community body on the proposal of its Director.[228] This provision is taken over in Article 32 of the Frontex Regulation.[229]

Article 30 of the Frontex Regulation governs the implementation of the budget. By 1 March following each financial year, the Agency's accounting officer communicates the provisional accounts to the Commission's accounting officer together with a report on the budgetary and financial management for that financial year. The Commission's accounting officer consolidates the provisional accounts of the institutions and decentralised bodies.[230]

The implementation of the budget of all agencies is subject to control from the European Court of Auditors.[231] By 31 March, the Commission's accounting officer forwards the Agency's provisional accounts of the previous financial year to the Court of Auditors, together with a report on the budgetary and financial management. This report is also forwarded to the Parliament and the Council. Upon receipt of the observations of the Court of Auditors, the Executive Director draws up the final accounts and forwards them to the Management Board for an opinion.

By 1 July the Executive Director sends the final accounts to the Commission, the Court of Auditors and the Parliament. These are public. By 30 September s/he shall also send a reply to the observations of the Court of Auditors, both to the Court of Auditors and the Management Board. In line with the Financial Regulation, the Parliament shall, upon recommendation from the Council, before 30 April of the discharge year + 2, give a discharge to the Executive Director in respect of the implementation of the budget for that year.

The general Financial Regulation provides for internal auditors for each institution.[232] It submits agencies to the control of the Commission's internal auditor.[233] In accordance with Article 71 of Regulation (EC, Euratom) No 2343/2002, Frontex has also appointed an internal auditor itself. The Management Board can further allow the Commission's financial irregularities panel, set up in accordance with Article 66(4) of the general Financial Regulation, to exercise the same powers in respect of the Agency, as it has in respect of Commission departments.[234]

Lastly, the European Anti Fraud Office (OLAF) can use its powers to investigate fraud, corruption and any other illegal activity adversely affecting the Community's financial

[228] Article 99, Commission Regulation (EC, Euratom) No 2343/2002, *supra* note 75.
[229] Amongst the first decisions adopted by the Management Board in 2005 were the Frontex Financial Regulation, *supra* note 111 and Frontex Financial Implementing Regulation, *supra* note 111.
[230] Article 128, Council Regulation (EC, Euratom) 1605/2002, *supra* note 111.
[231] Article 248 EC, Article 91, Commission Regulation (EC, Euratom) No 2343/2002, *supra* note 75.
[232] Article 85, Council Regulation (EC, Euratom) 1605/2002, *supra* note 111.
[233] Article 185(3), Council Regulation (EC, Euratom) 1605/2002, *supra* note 111.
[234] Article 47(4), Commission Regulation (EC, Euratom) No 2343/2002, *supra* note 75.

interests also in relation to the agencies.[235] As required by Article 31(2) of the Frontex Regulation, Frontex has acceded to the Inter-Institutional Agreement of 25 May 1999 concerning internal investigations by the European Anti-Fraud Office (OLAF).[236] The decisions concerning funding, as well as the implementing agreements and instruments that result from such decisions, explicitly stipulate that the Court of Auditors and OLAF may carry out, if necessary, on-the-spot checks among the recipients of Frontex funding and the agents responsible for allocating it.[237]

Although the Community financial rules and regulations constitute an important instrument for the transparent and sound financial management of the Agency's budget, the Commission Communication on the future of Regulatory Agencies notes that the small size of agencies compared to institutions would seem to justify "appropriate adaptations."[238] Frontex has found itself to some extent constrained by the need to conclude financial partnership agreements and grant agreements, the negotiation often takes considerable time.[239] There have been considerable delays in the reimbursement of Member States' expenses, which are partly of an organisational nature at both the Agency and Member State level, but also because of the difficulty national authorities have with the strict deadlines imposed and complexity of the rules.[240]

5.5 Accountability to the Public

Transparency may be considered both part of accountability and a prerequisite to it.[241] Article 28 of the Frontex Regulation contains a specific provision on 'Transparency and Communication,' which stipulates that the Agency shall provide the public and any interested party rapidly with "objective, reliable and easily understandable information" on its activities, in addition to the publication of the general report. Frontex however tends to underline the

[235] Article 2, Commission Decision 1999/352 (EC, ECSC, Euratom) establishing the European Anti Fraud Office (OLAF), *OJ* 1999, L/136/20 and Article 1(3), Regulation (EC) No 1073/1999, concerning investigations conducted by the European Anti-Fraud Office (OCAF), *OJ* 1999, L136/1. See also Article 33, Commission Regulation (EC, Euratom) No 2343/2002, *ibid*.
[236] Interinstitutional Agreement of 25 May 1999 concerning internal investigations by the OLAF, *OJ* 1999, L 136/15. See further the Frontex Management Board Decision of 16 December 2005 on the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interest.
[237] Article 31(3), Frontex Regulation.
[238] COM(2008) 135, *supra* note 25, 6.
[239] See also above, section 4.1.
[240] COWI Report, *supra* note 121, 81.
[241] Dyrberg, P., 'Accountability and Legitimacy: What it the Contribution of Transparency?', in: Arnull,A. and Wincott, D. (Eds), *Accountability and Legitimacy in the European Union* (Oxford, OUP, 2002), 83.

confidential nature of its activities. Management Board Meetings are confidential.[242] The information that is disseminated is often general and superficial. NGO's and IGO's have complained that it does not allow for a true understanding of the nature of Frontex's activities.[243]

Access to Documents

An important element of transparency is the right of access to documents held by the institutions and bodies of the EU. The CFI has held that access to documents is essential to allow the public "to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions (…)."[244] However, Article 255 EC on access to the documents of the Commission, Council and Parliament does not mention access to documents of European agencies.[245] Nevertheless, the founding regulations of all regulatory agencies, including that of Frontex in Article 28, make Regulation (EC) No 1049/2001 governing the public access to documents of the European Parliament, Council and Commission equally applicable.[246] Article 28 of the Frontex Regulation makes Regulation (EC) No 1049/2001 governing the public access to documents of the European Parliament, Council and Commission documents applicable to the Agency.[247]

As Aden has observed in relation to police cooperation in general, there is a "considerable gap between the theoretical level of accountability and reality."[248] This may in part be explained by the nature of the policy area requiring a higher level of confidentiality, in part a consequence of a secretive culture within national enforcement authorities and an unfamiliarity with the application of the EC's rules on access to documents.[249]

[242] Article 10, Management Board Decision of 25 May 2005, *supra* note 89.
[243] See for instance the ECRE Report, *supra* note 62, 10.
[244] Case T-92/98, *Interporc Im- und Export GmbH v Commission* [1999] ECR II-3521, para. 39.
[245] Article 15(3) of the TEU grants a right of access to documents of all Union institutions, bodies, offices and agencies.
[246] See also Recital 8, Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, *OJ* 2000, L 145/43. The Management Board has adopted a Decision laying down practical arrangement regarding public access to the documents of Frontex on 21 September 2006.
[247] The Management Board adopted a Decision laying down practical arrangement regarding public access to the document of Frontex on 21 September 2006.
[248] Aden, H., Administrative governance in the fields of EU police and judicial co-operation, in: Hofmann, H. and Türk, A. (Eds), *EU Administrative Governance* (Edward Elgar, Cheltenham, 2006), 354.
[249] The rules on access to public documents do however apply equally to both the Second and Third Pillar: Recital 7, Regulation (EC) No 1049/2001, *supra* note 246.

Article 4(1) of Regulation (EC) No 1049/2001 does allow for exceptions on the basis of public security, defence and military matters, amongst others. Article 9 of the Regulation contains rules on information which is classified as top secret, secret or confidential. However, in the words of the Court "any exception to the right of access to the institutions' documents under Regulation No 1049/2001 must be interpreted and applied strictly."[250] Nevertheless, one can imagine that detailed operational information relating to joint operations would qualify as non-accessible under these exceptions.

It is important to note that the Court has held that Article 4(5) of the Regulation, which states that a Member State "may request the institution not to disclose a document originating from that Member State without its prior agreement," cannot be interpreted so as to give the Member State a right simply to veto disclosure without any further motivation.[251] Instead, it has to put forward reasons cast in terms of the exceptions provided for by the Regulation.[252]

The Management Board Decision on practical arrangements for access to documents states in its recital that the "sensitive nature of tasks of FRONTEX" should be taken into full account and that access to documents should not jeopardise the "successful and effective fulfilling of Frontex objectives."[253] On various occasions the Agency has had to remind Member States of the confidentiality of information relating to joint operations when through national channels, operational details made their way to the media.[254] At the same time UNHCR has voiced concern over a lack of information regarding operational activities, preventing them deploying their resources effectively in a given operational area.[255]

Anecdotal evidence seems to suggest that Frontex has been unwilling to readily grant access to documents where possible, denying the existence of documents or refusing to consider the possibility of granting partial access under Article 4(6) of Regulation (EC) No 1049/2001. Although important improvements have been made recently, Frontex's website continues to lack a comprehensive and updated register of documents.[256] The Agency's

[250] Joined Cases C-39/05 P and C-52/05 P, *Sweden and Maurizio Turco v. Council* [2008] ECR I-0000, *nyr*, para. 71.
[251] Case C-64/05 P, *Internationaler Tierschutz* [2007] ECR I-11389, para. 75.
[252] *Ibid*., para. 76.
[253] Recital 6, Management Board Decision of 21 September 2006, *supra* note 247
[254] As was for instance the case with the joint operation HERA I: 'Stemming the Immigration Wave' (*BBC News*, 10 September 2006).
[255] Informal discussion with UNHCR staff in Malta, October 2005.
[256] Article 11, Regulation (EC) No 1049/2001, *supra* note 246. See in this respect the Decision of the European Ombudsman closing his inquiry into complaint 3208/2006/GG against the European Commission on the inadequacy of the Commission's register, 18 December 2008.

general report still does not contain an overview of the application of the rules on access to documents.[257]

Language Regime

Closely linked to the question of transparency and access to documents is the question of the Agency's language regime. Article 27(1) of the Frontex Regulation makes the provisions of Regulation No 1 of 15 April 1958 determining the languages to be used in the EC applicable to the Agency. This Regulation contains the same right as laid down in Article 21 EC, namely that all citizens can address the institutions or bodies mentioned in that article or in Article 7 EC in one of the official languages of the Union and are entitled to an answer in that language. This is once more made explicit in Artice 28(4) of the Frontex Regulation. Article 27(2) provides that the general report and the programme of work shall be translated in all official languages of the Community.

Some agencies have for reasons of efficiency reduced the number of languages used. The question of languages is however a very sensitive one, in particular in relation to agencies that take decisions binding on individuals.[258] In practice, Frontex's working language is English, although this is nowhere decided. A heated debate in one of the early Management Board meetings resulted in the Executive Director making a promise that during future meetings, depending on the availability of translators, a full language regime would be provided for. It has already been noted that the accreditation document of visiting border guards is produced in both the home country language and another official Community language.

Data protection

Although Frontex does not (yet) process personal information on a structural basis, it is covered by Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free

[257] As required by Article 17(1), Regulation (EC) No 1049/2001, *supra* note 246 and Article 15, Management Board Decision of 21 September 2006, *supra* note 247.
[258] See in this respect: Case C-361/01 P, *Kik v. OHIM* [2003] ECR I-8283, paras. 92-94, confirming the CFI's ruling in Case T-120/99, *Kik v. OHIM* [2001] ECR II-2235, paras. 62-63.

movement of such data, as pointed out by recital 19 to the Frontex Regulation.[259] As such, the Agency is subject to control by the European Data Protection Officer and has appointed an internal data protection officer.[260] The Commission's view is that the Agency does not have the competence to process personal data. The Agency however argues that the processing of personal data is necessary for the fulfilment of its tasks, in particular assistance in return operations and would as such fulfil the requirement of Article 5(1) of Regulation (EC) No 45/2001 which provides that the processing of personal data is lawful if it is necessary for the performance of a task carried out in the public interest on the basis of a legal instrument adopted on the basis of the Treaties.

5.6 Reporting and Evaluation Duties

A number of planning, reporting and evaluation duties has been laid down in both the Frontex Regulation, as well as the RABIT Regulation. These enable the Management Board, the Community institutions, but also the public, including interest groups, to better monitor the Agency's activities.

First is the adoption of a the annual Programme of Work.[261] The Management Board, before 30 September each year, and after receiving the opinion of the Commission, adopts Frontex's "agenda" for the coming year. The programme of work is forwarded to the European Parliament, Council and Commission. It shall be adopted "according to the annual Community budgetary procedure and the Community legislative programme in relevant areas of the management of external borders." This rather obscure formulation seems to underline that the programme of work has to be in line with the Community's financial perspectives and relevant Community legislation.

Second, is the adoption by the Management Board, before 31 March each year, of the general report for the previous year.[262] The report is forward by 15 June at the latest to the Parliament, the Council, the Commission, the European Economic and Social Committee and the Court of Auditors and is made public. It includes a "comprehensive comparative analysis" of the evaluation reports of joint operations which are made on the basis of Article 3(3) of the

[259] Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ* 2001, L8/1.
[260] Articles 1(2) and Article 24, Regulation (EC) No 45/2001, *ibid*.
[261] Article 20(2)(c), Frontex Regulation.
[262] Article 20(2)(b), Frontex Regulation.

Frontex Regulation. The RABIT regulation does not include a similar evaluation duty as regards the deployment of RABITs, which is to be regretted.

The analysis of the joint evaluation reports serves to enhance "the quality, coherence and efficiency of future operations and projects." The individual evaluation reports are generally available only upon request, and then only those parts that do not contain operational details. In terms of quality, an independent evaluation of Frontex in 2008 concluded that the reports usually only gave the "direct output of the activity and not the impact." In its general report of 2008, Frontex noted the need to better compare individual evaluations. However, more important would be to take into account that its activities although limited by its mandate to border management, have wider impacts. In particular, there should be more information on the number of asylum requests filed, the results of these procedures, the diversion effects caused by joint operations, as well as the fate of people that are being directly returned.

On the basis of Article 33 of the Frontex Regulation, every five years the Management Board commissions the evaluation of the implementation of the Frontex Regulation. The results of the first evaluation, which was to be carried out three years after the Agency commenced its work, were presented to the Management Board at its meeting in February 2009.[263] The evaluation examines the Agency's effectiveness, impact and working practices. On the basis of the evaluation the Management Board shall forward recommendations to the Commission, which together with its own opinion and where appropriate proposals, to the Council. [264] Both the findings of the evaluation, so in theory not the whole evaluation report, and the recommendations are to be made public. The RABIT Regulation in Article 13 provides for an evaluation by the Commission one year after its entry into force. This evaluation was included in the Commission evaluation of the Agency itself, as part of its 2008 "Border Package." However, the Commission's main finding, as well as that of the Article 33 evaluation, was that it was too early to draw conclusions, especially because no deployment of RABITs had yet taken place.[265]

[263] COWI Report, *supra* note 121.This evaluation should not be mistaken with the evaluation carried out by the Commission in 2008, COM(2008) 67, *supra* note 65.
[264] Considering the extension of the co-decision procedure to Article 66 EC, Council should be read as Council and Parliament.
[265] SEC(2008) 148, supra note 71, 18 and COWI Report, supra note 121, 55.

6. The Future Development of Frontex

Let us now consider how the Commission envisages the role of Frontex to evolve in the future. The Commission in its Report on the Evaluation and Future Development of the Frontex Agency, as part of its "Border Package" presented in February 2008, aims to reinforce both Frontex's role as a more classical regulatory agency, as well as its role in the coordination of operational activities. The Communication rather carefully states that Frontex's "role should be expanded as necessary in response to concrete needs, based on a step-by-step approach and a gradual reinforcement of its administrative capacity, and on a continuous evaluation of how it fulfils its tasks."[266] Nevertheless the Commission's vision for the long term development of Frontex would considerably expand the remit of its activities.

The Commission wants to strengthen Frontex's role as the centre of a system of information exchange between national authorities themselves, as well as between the Agency and these authorities. It suggests that the Agency be put in charge of managing ICO-net and take over the activities of the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI).[267] It would considerably strengthen the role of Frontex as an institutional actor, but also in terms of having readily accessible information from a range of national authorities dealing with migration management (not limited to border guard authorities) for the purposes of its own risk-analyses. Arguably putting Frontex in charge of the ICO-net would require an amendment of the ICO-net decision and preferably of the Frontex Regulation itself. If Frontex were to take over the work of CIREFI, this could entail the risk of limiting the CIREFI's current tasks too much to immigration and border control only. In the long run, the Commission refers to Frontex's role in the creation of a network integrating all maritime surveillance systems as mapped out in the Communication on the establishment of EUROSUR. The Commission suggests that Frontex be given access to surveillance information on a more structural and systematic way, which could form the basis for a "Frontex intelligence led information system."[268]

Above, we briefly referred to the possible extension of Frontex's tasks flowing from a greater horizontal integration between border and customs authorities. The Hague Programme already stated that an evaluation of Frontex should examine whether "the Agency should

[266] COM(2008) 67 final, supra note 65, 8.
[267] *Ibid.*, 6. The CIREFI consists of Member States' migration experts who meet on a monthly basis with the logistical support of the General Secretariat of the Council. It was established by the Council Conclusions of 30 November 1994, *OJ* 1996, C274/50.
[268] COM(2008) 68 final, Commission Communication 'Examining the creation of a European Border Surveillance System (EUROSUR)', 9.

concern itself with other aspects of border management, including an enhanced co-operation with customs services and other competent authorities for goods-related security matters."[269] The Commission does however appear rather reluctant, recommending a study on inter-agency cooperation and suggesting the launch of Frontex/Commission-led joint operations in coordination with national customs authorities.[270] It seems unlikely that the Commission will be willing to encroach upon the powers of its own DG Taxations and Customs. It should moreover be realised that the Customs Union has been functioning satisfactorily without the involvement of a specific central European regulatory authority.

A potentially important new task for Frontex would be its involvement in the work of the Schengen Evaluation Committee.[271] Although the Schengen evaluations cover the whole *acquis*, going beyond border management, Frontex could according to the Commission "provide added value to these evaluations through its independent status, its expertise on external border control and surveillance and its activities on training and risk analysis."[272] Again, in the Hague Programme the Council had already called for "a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, including unannounced inspections."[273] The Council's conclusions on the Commission Communication carefully state that "FRONTEX should play a supportive role in the Sch-eval mechanism, with regard to relevant risk analysis for the purpose of evaluation missions and possibly also by providing necessary training to optimise implementation of those missions."[274] Frontex has in the meantime organised the first course for the national participants in Schengen evaluations.[275]

The current Schengen evaluation mechanism does not provide for unannounced visits.[276] The evaluation reports for individual Member States are issued "every two or three years (at best), the conclusions are neither totally autonomous nor immediately operational,

[269] The Hague Programme, *supra* note 65, point 1.7.1.
[270] COM(2008) 67 final, *supra* note 65, 8
[271] *Ibid*., 8.
[272] *Ibid*.
[273] The Hague Programme, *supra* note 65, point 1.7.1. Note also Article 70 TFEU which gives the Council the power to "adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title [Justice and Home Affairs] by Member States' authorities."
[274] Draft Council Conclusions on the management of the external borders of the member states of the European Union, adopted by the JHA Council, Luxembourg, 5-6 June 2008 (Council Document 9873/08), point 7.
[275] Frontex, 'Frontex organises the first course for Schengen evaluators' (Frontex News, 11 May 2009).
[276] Callovi, G., 'Securing External Frontiers in a Union of 25' (Policy Brief 5, Dutch Presidency Conference on Asylum, Migration and Frontiers, September 2004), 8.

and the membership of the evaluation team constantly changes."[277] We would argue that Frontex's position as a regulatory agency allows for a much stronger role in the Schengen evaluation process than the one proposed by the Commission or the Council. As was noted in the previous chapter the current role of the Council in evaluating the implementation of the Schengen borders *acquis* can be seen as a remnant of the intergovernmental origins of cooperation in this area. Carrying over these powers to an independent agency rather than the Commission, could constitute an acceptable compromise, as well as a logical next step in the communitarisation of the management of the external borders. It would encourage the Commission to act more aggressively in enforcement, ensuring a more uniform application of the Schengen border *acquis*.[278] A potential danger of reinforcing this regulatory role of the Agency may however be that it could prejudice its good relations with national border guard authorities and as a result its ability to act as coordinator of operational cooperation.

In any case, the Commission does not seem to have abandoned the idea for a European Corps of Border Guards. It was argued earlier that the adoption of the RABIT Regulation constitutes a new step towards the gradual establishment of such body. Even if a specific reference to the creation of such corps is missing, the Commission sees a need to determine "to what extent coordination of Member States' resources should be replaced with the assignment of border guards and equipment on a permanent basis."[279] Not only would this render the Agency much more independent from Member States' participation and resources, it would also imply a more structural presence of the Agency on the territory of Member States situated at the external borders.

The Communication recognises that the conferral of executive powers on the Agency's staff would call for a review of Frontex legal framework. The question however, is whether the Community even has the competence to endow "Frontex border guards" with public authority powers. We would argue that under the current treaty framework a legal basis to do so is lacking, even under a very wide interpretation of Article 62(2)(a) EC or Article 66 EC, the legal bases for the Frontex and RABIT Regulation. The entry into force of the Lisbon Treaty could mean an important change in this respect, considering the much broader formulation of Article 77(2)(d) TFEU, which provides that the Union has competence to adopt "any measure necessary for the gradual establishment of an integrated management

[277] *Ibid*.
[278] Cf. Kelemen, R., *supra* note 43, 112.
[279] COM(2008) 67 final, *supra* note 65, 10.

system for external borders."[280] Arguably this wide formulation would also allow the Community legislator to extend Frontex's competences to the field of police cooperation on the basis of this article.[281] However, the question is whether this would be politically feasible. It would certainly change not only the nature of cooperation in the AFSJ, but arguably that of European integration, were EU officials to be endowed with the power to use force.

A final point that the Commission Communication raises is the importance of cooperation with Third Countries, contemplating a possible extension of Frontex's competences to European border control missions conducted in third countries. The question of the external dimension of European border management will be discussed in the final chapter.

7. Conclusion

The image that has been drawn of Frontex as a regulatory agency shows that in fact it is an agency with two faces. One is the more classical regulatory agency with informational and technical assistance tasks, the other is that of the only police agency under the First Pillar, although of course not endowed with any operational powers itself.

Although Frontex is formally independent, this independence is considerably constrained both *de jure* as well as *de facto*. Member States, as well as the Institutions continue to have an important say over the Agency's activities, which on the one hand reflects the political nature of Frontex's activities, but on the other ignores the rationale of Frontex as an independent and technical body. The European Parliament can exercise considerable control by having the last say over the Community's subsidy to the Agency's budget.

Once more one may observe difficulties in terms of accountability and legal certainty, which seem inherent in the way in which operational cooperation is taking shape in the AFSJ. Most importantly, judicial review of joint operational activity coordinated by Frontex remains with the Member States. The responsibilities of Frontex for the potential violations of fundamental rights in the course of joint operations is unclear. The status of the operational plan, and importantly the responsibility for asylum seekers remains problematic. On a more positive note however, the visibility of Frontex and the strict rules in terms of access to

[280] Council Conclusions on Integrated Border Management (Council Document 15801/06, 27).
[281] Although one could argue that this belongs in the chapter on police cooperation: Title V, Chapter 5, TFEU.

documents to which it is subject, may contribute positively to the accountability not only of the Agency, but also of the activities of Member States' national border guards.

It would nevertheless be a good idea for the European legislator to consider the future role of Frontex in a more structured manner. The RABIT Regulation shows how the EU's policy for the management of the external borders is essentially control based and how a sense of crisis and the urge to show decisive action results in legislation that is on the one hand far-reaching and on the other hand of limited practical relevance. The Community should however move beyond this "panic-politics" and think beyond a mere extension of Frontex's tasks. In the absence of a true constitutional framework for operational cooperation, which can ensure sufficiently high levels of accountability of such operations, perhaps priority should be given to the development of the Agency's regulatory role.

If indeed, the management of the Schengen external borders is to remain with the Member States, better results could be expected from financial burden sharing under the EBF and an improved cooperation and exchange of information, without the actual deployment of Member State's border guards on territory that is not of their own Member State. While the case could be made for the deployment of law enforcement staff outside national territory in cases of specific crimes with a cross-border element, this is not the case for the management of the external borders.

Where national law enforcement staff is to be deployed outside the Member State of origin, one may question whether the example of Frontex deserves following. In the field of police cooperation there does not exist a set of harmonised rules that could be applied, as is the case for the management of the external borders in the form of the SBC. More important is the realisation that a system which allows law enforcement officers from one Member State to exercise coercive powers under the rules of another, means that such officers work within a legal framework in which they are not trained and which they cannot reasonably be expected to fully understand.

X. The External Dimension of EU Border Management

1. Introduction

> "Se non risolviamo questo problema e non lo facciamo in cooperazione con i paesi di provenienza, finisce che le operazioni di Frontex in alto mare diventano un modo per portare in Europa clandestini"[1]
>
> *If we do not resolve this problem, and if we do not do so in cooperation with countries of origin, the Frontex operations on the high seas will become a way of bringing irregular immigrants to Europe*

With the merging of internal and external security after the fall of the Berlin wall, the cooperation in the field of Justice and Home Affairs (JHA) soon developed a so-called "external dimension."[2] Independent of any such external dimension, borders themselves are *par excellence* the site where internal and external security concerns meet. By its very nature the management of the EU's external borders takes place at the crossroads of Community, national and public international law. Not only the Community, but also the Member States and Frontex maintain relations with third countries on matters relating to the management of the EU external borders.[3] This raises important questions as to the legal basis for such action and the division of competence between the various actors.

The Council's Strategy for the External Dimension of the JHA of December 2005 emphasised that the policy should pursue both internal and external policy objectives and should be "coordinated across the pillars", including the Common Foreign and Security Policy and European Security and Defence Policy.[4] This implies that the external dimension

[1] Statement by former Italian Minister of the Interior, Guiliano Amato (Press Release Italian Ministry of the Interior, 'Immigrazione: il Ministro dell´Interno a Lussemburgo al Consiglio giustizia e affari interni della Commissione Europea,' 20 April 2007).

[2] Lavenex, S., 'EU External Governance in "Wider Europe"', 11 *JEPP* 4 (2004), 689. See also Chapter VII. A variety of concepts has been applied to describe the different ways in which EU policies exercise effect outside the EC/EU territory, such as external governance, externalisation and extra-territorialisation. See for instance: Rijpma, J. and Cremona, M., 'The Extra-territorialisation of EU Migration Policies and the Rule of Law' (Florence, EUI Law Working Paper 1/2007, 2007), 11-12 and Balzacq, T, 'The External Dimension of EU Justice and Home Affairs: Tools, Processes, Outcomes', (Brussels, CEPS Working Document No. 303, September 2008), 2.

[3] This chapter will not discuss the relationship between the Community and the Schengen Associated Countries (SAC) as this has already been the subject of scrutiny in earlier chapters.

[4] Council, 'A Strategy for the External Dimension of JHA : Global Freedom, Security and Justice' (Council Document 15446/05), 5.

of the management of the EU external borders serves not only the control and surveillance of said borders, but also the exportation of Schengen standards and best practices to third countries, including institution and capacity building in the area of border management structures in those countries.[5]

In the discussion on the external dimension of the Community's migration and asylum policies the focus is often on the way in which the EU attempts to control unwanted migration flows from a distance, aiming to avoid their actual arrival at the external borders.[6] We already referred to the term "remote policing" in Chapter II in order to describe the way in which this is done, for instance through the imposition of visa requirements.[7] The 2006 Council Conclusions which define the concept of integrated border management specifically include measures in third countries and cooperation with neighbouring countries. They furthermore refer to inter-agency cooperation for border management and international cooperation.[8] Here it should be noted that in the case of the EU's southern maritime borders, it is the control of the external borders itself that is increasingly shifted beyond the Schengen territory.

The quotation cited at the head of this chapter by former Italian minister of the Interior Guiliano Amato refers to the situation in which Italian vessels participating in Frontex joint operations in the Mediterranean save irregular migrants on the high seas, subsequently disembarking them on Italian soil. It is exemplary of the importance that Member States attach to cooperation with third countries for the purpose of the management of the EU's external borders, but also highlights one of the many legal questions that this extra-territorial border surveillance raises.

2. The External Dimension of Migration and Border Management

The Tampere Agenda emphasised the importance of using "all competences and instruments at the disposal of the Union, and in particular, in external relations" to build the AFSJ, integrating JHA concerns in the definition and implementation of other Union policies and activities.[9] The Hague Programme reiterated that "[a]ll powers available to the Union,

[5] COM(2004) 491 final, Commission Communication on a Strategy on the External Dimension of the Area of Freedom, Security and Justice, 5.
[6] See e.g. Guiraudon, V., 'Before the EU border: Remote Control of the "Huddled Masses"', in: Groenendijk, K. *et al*. (Eds), *In Search of Europe's Borders* (The Hague, Kluwer Law International, 2003), 191-214.
[7] Bigo, D. and Guild, E., 'Policing at Distance: Schengen Visa Policies', in: Bigo, D. and Guild, E., *Controlling Frontiers: Free Movement Into and Within Europe* (Aldershot, Ashgate, 2005), 234.
[8] Council Document 15801/06, 27, 28.
[9] European Council Conclusions, Tampere, 15-16 October 1999, point 59.

including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice."[10]

Balzacq argues that the external dimension of JHA "is best thought of as a distinctive policy, with its own *raison d'être* and mechanisms."[11] However, this is not the position of the Community institutions. The Commission has argued that "the external dimension of the area of justice, freedom and security cannot be seen as an independent policy area but must be part of the EU's external policy activities."[12] It may be better to distinguish the external dimension of the JHA as an internally driven external policy, or as Cremona puts it "an example of the interdependence of the internal and external dimension of a policy."[13]

The Commission, in its Communication on a Strategy for the External Dimension of JHA, emphasised that the external dimension of the AFSJ does not only work for the benefit of the establishment of the internal area of freedom, security and justice. The Council in its Strategy affirmed that "the development of the area of freedom, security and justice can only be successful if it is underpinned by a partnership with third countries on these issues which includes strengthening the rule of law, and promoting the respect for human rights and international obligations."[14] Although the external dimension of the AFSJ may indeed benefit third countries, there should be no doubt that ultimately the EU's policy is essentially driven by self-interest. In the words of the German presidency, the EU can only accomplish its goal of establishing an AFSJ by "confronting security threats and of strengthening freedom and justice *to the benefit of European citizens*" in cooperation with third countries.[15]

Not surprisingly, the external dimension of migration and border management has been high on the agenda. The Seville European Council concluded that combating illegal immigration should involve "the use of all appropriate instruments in the context of the European Union's external relations."[16] It furthermore called for a "systematic assessment of relations with third countries which do not cooperate in combating illegal immigration."[17]

The Commission in its Communication on a Strategy for the external dimension of JHA stated that "[e]fficient border management is vital to fight threats such as terrorism and

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[10] The Hague Programme, Annex to the European Council Conclusions, Brussels, 4-5 November 2004, point 4.
[11] Balzacq, T., *supra* note 2, 1.
[12] COM(2004) 491 final, *supra* note 5, 11.
[13] Cremona, M., 'EU External Action in the JHA Domain: A Legal Perspective (Florence, EUI Law Working Paper 2008/24, 2008), 4.
[14] COM(2004) 491 final, *supra* note 5. Council Strategy, *supra* note 4, 2.
[15] JHA External Relations Multi-Presidency Work Programme (Council Document 5003/07), 1. Emphasis added.
[16] European Council Conclusions, Seville, 21-22 June 2002, point 33.
[17] Seville European Council Conclusions, *ibid.*, point 35. Although the Council did adopt a 'Monitoring and evaluation mechanism of the third countries in the field of the fight against illegal immigration' (Council Document 15292/03), this does not seem to have had much practical value.

organised crime, while also contributing to good relations between neighbouring states".[18] Although not referring to irregular migration here, throughout the Communication border management is mentioned in connection with migration and asylum. It follows also from the Council's Strategy that border controls are seen as an important means of tackling irregular migration:

> "The EU must pursue in close co-operation with third countries both short- and long-term action to tackle irregular flows and their underlying causes. This should include efforts to strengthen border controls, improve travel document security and combat people smuggling and trafficking. These must be accompanied by readmission agreements that assure returns of illegal immigrants, with priority being accorded to concluding planned agreements and implementing existing ones. (…)"[19]

By enhancing the capacity of third countries' systems of migration and border management, the EU is essentially aiming to shift border controls upstream.

A similar rationale underpinned the AENEAS Programme, which provided financial and technical assistance to third countries in the area of migration and asylum.[20] It was adopted under Articles 179 and 181a EC, on development aid and assistance to non-developing third countries respectively, which may explain why improved management of migration flows was presented as being important for the development of some countries.[21] One of the specific actions the programme could support was the "evaluation, and possible improvement, of the institutional and administrative framework and of the capacity to implement border controls as well as improvement in the management of border controls, including by means of operational cooperation."[22]

It is telling that the programme aimed specifically, although not exclusively, at countries that had concluded a re-admission agreement with the EU.[23] As was noted in earlier chapters, the conclusion of readmission agreements, as well as increased cooperation on illegal immigration and border management, may all be prerequisites for visa facilitation.[24]

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[18] COM(2005) 491 final, *supra* note 5, 5.
[19] Council Strategy, *supra* note 4, 3-4.
[20] Regulation (EC) No 491/2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), *OJ* 2004, L80/1.
[21] Recital 4, *ibid*.
[22] Article 2(2)(f), *ibid*.
[23] Article 1(2), *ibid*.
[24] COM(2006) 735 final, Commission Communication, 'The Global Approach to Migration one year on: Towards a comprehensive European migration policy', 7.

There is the assumption that readmission makes Member States and third states responsible for controlling their borders efficiently.[25]

An informal meeting of the European Council at Hampton Court in October 2005, triggered by events in Ceuta and Melilla earlier that month, asked the Commission to come forward with a list of priority actions, with a special focus on the African region.[26] The European Council subsequently adopted an Action Plan called a "Global Approach to Migration: priority actions focusing on Africa and the Mediterranean".[27] Since then three more Commission Communications dealing with "the Global Approach" have seen the light, expanding it with an East and South-Eastern Neighbourhood Dimension.[28] The firm language from the Seville European Council Conclusions has largely been replaced by an emphasis on partnership, dialogue and cooperation.

The Commission and Council both stress the importance of a "balanced, global and coherent approach towards migration", including attention to the root causes of migration and legal migration opportunities.[29] One could read, in the way the Global Approach is presented as a break with the past, the implicit recognition that so far there has been too strong an emphasis on the reinforcement of migration and border controls. However, it is yet to be seen how far the Global Approach will indeed make a difference, bearing in mind that even the Seville Council Conclusions called for a comprehensive and balanced approach.[30] The 2008 Council Conclusions on enhancing the Global Approach to Migration once more call for priority action on:

> improved border management, identification of forged or falsified documents, negotiation and implementation of readmission agreements, (…) capacity building and technical assistance related to migration outflows and inflows; and the prevention of and fight against illegal

[25] EU Schengen Catalogue, External borders control, removal and readmission: recommendations and best practices, Council, February 2002, 55: http://www.consilium.europa.eu/uedocs/cmsUpload/catalogue20EN.pdf.
[26] In October 2005 there were repeated attempts by predominantly sub-Saharan Africans to enter Ceuta and Melilla, storming the fences surrounding the Spanish enclaves. A number of migrants died and many were injured as Moroccan and Spanish authorities attempted to prevent their entry, others were injured by the barbed wire. They often seriously and on occasion fatally injuring themselves: see inter alia: '"Oí tiros, muchos tiros, y sólo pensé en correr sin mirar atrás"' (*El País*, 30 September 2005) and 'Seis inmigrantes mueren en el lado marroquí al intentar pasar a Melilla' (*El Mundo*, 6 October 2005). See also COM(2005) 621 final, Commission Communication, 'Priority actions for responding to the challenges of migration - First follow-up to Hampton Court'.
[27] European Council Conclusions, Brussels, 15-16 December 2005, Point IV and Annex I.
[28] Most importantly: COM(2006) 735 final, *supra* note 24; COM(2007) 247 final, Commission Communication, 'Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union', COM(2008) 611 final, Commission Communication, 'Strengthening the Global Approach to Migration: increasing Coordination, Coherence and Synergies'.
[29] European Council Conclusions, *supra* note 27, point 8; COM(2005) 621 final, *supra* note 26, 2.
[30] Seville European Council Conclusions, *supra* note 16, point 33.

> migration and trafficking in human beings, with the involvement of FRONTEX where appropriate and strengthening asylum and refugee protection (…).[31]

It is true that the Conclusions continue by saying that priority actions should also focus on fostering the links between migration and development, but in reality there has been little concrete action taken in this area. The last Commission Communication that specifically addresses this link dates back to 2005, although the 2007 Commission Communication on circular migration and mobility partnerships is considered to build on this Communication.[32] Nevertheless, the European Council Conclusions of 18-19 June 2009 once more places cooperation with third countries squarely in the context of the fight against irregular migration.[33]

3. Shaping the External Dimension of EU Border Management

The external dimension of the EU's border management policy is shaped in a number of different ways. The conclusion of an international agreement is only one of the ways in which EU policies may gain an external dimension.[34] The EU/EC can adopt legislation independent of third countries, which nevertheless has an important impact on third countries and their nationals. Examples are the Community's visa policy or the Schengen borders regime. It may also adopt legislation autonomously which will require the consent or active participation of third countries at which it is directed in order to be effective. Here the Returns Directive or the posting of Immigration Liaison Officers can serve as an example.[35] A third way, the importance of which should not be underestimated, is the promotion of the EU *acquis* in third countries and the adoption of (parts of that) *acquis* in their domestic legal orders. This may take place through the conclusion of an international agreement, such as an association agreement, but may also be achieved through soft-law mechanisms, such as benchmarking, peer review and exchange of good practices. Often, the EU's external policies consist of a

[31] Council Conclusions on enhancing the Global Approach to Migration (Council Document 9604/08), 5.
[32] COM(2005) 390 final, Commission Communication on Migration and Development: Some concrete orientations; COM(2007) 248 final, Commission Communication on circular migration and mobility partnerships between the European Union and third countries, see on the mobility partnership below, 2.
[33] European Council Conclusions, Brussels, 18-19 June 2009, point 36.
[34] Lavenex, S. and Uçarer, E., 'The External Dimension of Europeanization', 39 *Cooperation and Conflict* 4 (2004), 418. See also Rijpma, J. and Cremona, M., *supra* note 2.
[35] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country, *OJ* 2008, L 348/98 ("Returns Directive").

combination of the above instruments. Importantly, financial support programmes fund technical and operational cooperation for the achievement of mutually agreed objectives.

3.1 External Competence for the Management of the EU's External Borders

Let us first examine the legal basis for external competence in the field of external border management, i.e. the competence to conclude international agreements in this policy area. Title IV EC does not contain any express external powers.[36] In fact such express conferral in the EC Treaty is rare. Instead the ECJ has developed an elaborate doctrine of implied external competences.[37] A recent restatement of this jurisprudence can be found in Opinion 1/2003.

> "The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see *ERTA*, paragraph 16). The Court has also held that whenever Community law created for those institutions powers within its internal system for the purpose of attaining a specific objective, the Community had authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (Opinion 1/76, paragraph 3, and Opinion 2/91, paragraph 7)."[38]

Under Title IV EC the conclusion of visa facilitation agreements on the basis of Articles 62(2)(b)(i) and (ii) EC forms an example of an implied external competence which exists as a result of internal legislation. The power to conclude readmission agreements under Article 63(3)(b) EC is an example of an implied external competence which is necessary for the achievement of internal EU objectives. An implied external competence for the management of the EU's external borders would have to be found in Articles 62(2)(a) and 66 EC.

Implied external competence can either be exclusive or shared. The Court has held that an implied external competence is exclusive where an internal competence can be

[36] This would not change with the entry into force of the Lisbon Treaty, with the exception of an express competence for the negotiation of readmission agreements (Article 73(4) TFEU) and partnership and association agreements on asylum (Article 78(2)(g) TFEU).
[37] The possibility of having implied treaty making powers is confirmed by the Lisbon Treaty in Article 216(1) TFEU.
[38] Opinion 2003/1, *Lugano Convention* [2006] ECR I-1145, para. 114, with reference to Case 22/70, *Commission v. Council* (ERTA) [1971] ECR 263, Opinion 1/76, *Inland waterway vessels* [1977] ECR 741; Opinion 2/91, *ILO Convention No 170* [1993] ECR I-1061.

effectively exercised only at the same time as external competence.[39] Second, the Court has held that implied external competence can become exclusive through pre-emption, meaning that where common rules have been adopted, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules.[40] Under Title IV however a very pragmatic approach seems to have been adopted in response to Member States' fear of losing external competence in this policy area under which shared competence remains the norm.[41]

A good example is the acceptance of a shared competence for the conclusion of readmission agreements between the EU and third countries.[42] It is worth noting that a number of Community readmission agreements concluded with neighbouring countries, provide for such an accelerated procedure if a person has been apprehended in the border region after irregularly crossing the border coming directly from the territory of the requested state.[43] The details for such accelerated procedure are to be negotiated by the individual Member States in the framework of implementing protocols which are to be concluded between individual Member States and the third country in question.[44]

The persistence of shared rather than exclusive competence may also be explained by the fact that while agreements in this policy area may benefit the EU as a whole, there may be instances in which the Member States are in a better position to negotiate such agreements, either because of special relations with the third country in question or because they are able to give something in return, such as a legal migration quota or national development aid. Individual Member States thus remain important actors, in particular where questions of migration and border management are tied into broader discussions on development and legal migration. Moreover, as we showed in Chapter VII, migration issues are often linked to questions of criminal law and security which remain within Member States' competence.

Member States have been represented alongside the Commission at the Euro-African

[39] Opinion 2003/1, *ibid*, para. 115.
[40] *Ibid.*, para. 116.
[41] Cremona, M., *supra* note 13, 23.
[42] Cremona, M., *ibid.*, 20-21. See also for a detailed analysis of the competence question: Coleman, N., *European readmission policy : third country interests and refugee rights* (Leiden, Martinus Nijhoff Publishers, 2009), 73 ff. On the continuing relevance of bilateral agreement and the increasingly informal nature thereof, see: Cassarino, J.-P., 'Informalising Readmission Agreements in the EU Neighbourhood', 42 *International Spectator* 2 (2007), 179-196.
[43] This is the case for the agreements with Macedonia, Moldova, Russia, Serbia, Ukraine: Trauner, F. and Kruse, I., 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood' (Brussels, CEPS Working Document No. 290, April 2008), 25.
[44] See for instance Articles 6(3) and 19(1)(b), Agreement between the Community and FYR Macedonia on the readmission of persons residing without authorisation, *OJ* 2007, L334/7 and Articles 6(3) and 20(1)(b), Agreement between the Community and Russia on readmission, *OJ* 2007, L129/40.

ministerial conferences on migration and development, based on the initiative of the Moroccan government.[45] It was only after the opposition of other Member States that French President Sarkozy's plan for a Mediterranean Union was incorporated into the Euro-Mediterranean Partnership, the re-launched and renamed Barcelona Process.[46] What is more, individual Member States have continued to negotiate bilateral agreements with third countries of origin on questions of migration and border management.[47]

In the specific field of external border management, a legal argument in support of this practice of non-exclusivity, may be found in Protocol 31 (on external borders) attached to the EC Treaty, if one interprets this provision as a limitation of the Court's doctrine on pre-emption and implied powers:

> "The provisions on the measures on the crossing of external borders included in Article 62(2)(a) of Title IV of the Treaty shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Community law and other relevant international agreements."

One could however also read the protocol as a confirmation that Member States retain competence to sign agreements on external borders, but only as long as the Community has not acted in these fields.[48] The Court in Opinion 1/94 clearly held that "only in so far as common rules have been established at internal level does the external competence of the Community become exclusive."[49] It could be argued that in as far as the Schengen Borders Code (SBC) exhaustively regulates the crossing of the external borders by individuals, Member States cannot conclude agreements with third countries which would affect these common rules in any way. At the same time, in relation to the broader management of the external borders, there is no valid reason why Member States should no longer be competent to conclude agreements on for instance operational cooperation at their stretch of the

[45] See the Rabat Declaration and Action Plan adopted at the first conference held in Rabat, 10-11 July 2006.
[46] 'Merkel criticises Sarkozy's Mediterranean Union plans' (*EU Observer*, 6 December 2007); Speech Nicolas Sarkozy (Toulon, 7 February 2007); Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference of 27 and 28 November 1995 and its work programme.
[47] In particular the Southern Member States, Portugal, Spain, France and Italy, have been very active in negotiating such agreements. Spain has concluded agreements with both African and Latin-American countries. See for instance the Acuerdo Marco de Cooperación en material de inmigración entre el Reino de España y la República de Mali, *BOE* No 135, 4 June 2008, 25633. Similar agreements have been concluded with Guinea Conakry, Guinea Bissau, Cape Verde, Mali, Niger and Mauritania. Negotiations with Senegal, Cameroun and Ghana are in course.
[48] This is the position advocated by Peers, S., *EU Justice and Home Affairs* (Oxford, OUP, 2006), 177.
[49] Opinion 1/94, *WTO Agreement* [1994] ECR I-05267, para. XIV.

Schengen external borders, especially since the responsibility for the management thereof remains with the individual Member State.

Two examples show that practice is inconclusiveness as regards the question of the nature of the external competences of the EC in relation to the external borders. The Local Border Traffic (LBT) Regulation forms a derogation from the SBC.[50] It does not itself establish a regime for local border traffic at the external borders of the Member States, but rather requires implementation by means of bilateral agreements between individual Member States and their respective neighbouring third countries.[51] The Regulation makes no reference to the Protocol on external borders attached to the EC Treaty. On the one hand it leaves the power to conclude bilateral agreements with the Member States, which could be read as a broad interpretation of the Protocol. On the other hand, the Regulation effectively curtails the Member States' external competence by the limits within which they may act, requiring also reciprocity ("comparability of treatment").[52] As such it could be argued that the Member States have merely been empowered by the EC to conclude agreements in order to implement an exclusive competence, comparable under Article 2(1) FEU.

Even where Member States retain competence to conclude agreements, they are legally constrained by the Community law principle of loyal cooperation, which affects the way in which those competences can be exercised in practice, and in particular imposes obligations of information and consultation.[53] The Protocol itself states that Member States have to "respect Community law and other relevant international agreements". Article 13(1) of the LBT Regulation provides that Member States must eliminate incompatibilities in existing bilateral agreements with neighbouring third countries on local border traffic.[54] It furthermore contains explicit obligations of information and consultation. Under Article 13(2) Member States are obliged to consult with the Commission before concluding or amending a bilateral agreement and to eliminate any incompatibly found by the Commission. This does not seem to preclude the possibility that a conflict over the correct interpretation of the Regulation would be brought before the ECJ. Article 19 obliges Member States to notify bilateral agreements concluded under the LBT Regulation to the Commission.

[50] Regulation (EC) No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States, *OJ* 2006, L405/1 (hereinafter: 'LBT Regulation').
[51] Article 13, LBT Regulation. Cf. to the provisions of some of the Community Readmission Agreements which leave it to the individual Member States to negotiate bilateral implementing protocols regarding procedures for readmission, *supra* note 44.
[52] Articles 14 and 15, LBT Regulation.
[53] Article 10 EC. C.f. Case C-266/03 *Commission v. Luxembourg* ("Inland Waterway") [2005] ECR I-4805, para. 60.
[54] Cf. Article 307 EC, second paragraph and Case C-62/98, *Commission v. Portugal* [2000] ECR I-5171.

The question remains of how far Member States are allowed to refuse to conclude such agreements, for instance in view of national foreign policy interests.[55] The permissive wording that Member States are allowed to conclude bilateral agreements, seems to imply that they are not under an obligation to do so. If the Protocol on the external borders is to be interpreted so as to respect the competence of Member States to conclude agreements on their external borders this would also mean that they remain free not to use this competence. Likewise, considerations related to the EU's Common Foreign and Security Policy (CFSP) could in principle not stop a Member State from exercising its competence to conclude such an agreement. Although one could argue that Member States' powers are subject to Article 10 EC and Article 11(2) EU on the obligation of solidarity in the Union's external relations, the Member States remain legally competent to act in contravention of their CFSP obligations. Moreover, these obligations cannot be enforced by the ECJ, which lacks jurisdiction over the CFSP.

A second example, the conclusion by the Community of the so-called Palermo Protocols, would seem to justify a more restrictive reading of the Protocol on the External Borders.[56] As we have seen in Chapter VIII, both the Community and the Member States have become parties to the Protocol against Migrant Smuggling and the Protocol against Human Trafficking attached to the UN Convention against Organised Crime. The Commission opposed the Council's attempt to enumerate precisely in the competence declaration the provisions of the two Protocols that would fall under Community competence. It argued that in view of the amount of legislation adopted in this field and the "rapid evolution" of this area, any competence declaration would be incomplete or soon outdated.[57]

Moreover, the Commission clashed with the Council on the fact that some Member States had proceeded to ratify both Protocols, arguing that they did not have the power to ratify the protocols in their entirety and were as such encroaching upon an area of exclusive community competence.[58] Again there was no mention made of the Protocol on the External Borders. The Commission eventually succeeded in negotiating a very generally formulated

[55] Of course national foreign policy interests in the majority of cases would push in favour of the conclusion of such agreement, but this does not necessarily have to be the case.
[56] Council Decision 2006/616/EC on the conclusion of the Smuggling Protocol, in so far as its provisions fall within the scope of Articles 179 and 181a EC, *OJ* 2006, L262/24; Council Decision 2006/617/EC on the conclusion of the Smuggling Protocol, in so far as its provisions fall within the scope of Part III, Title IV EC, *OJ* 2006, L262/34; Council Decision 2006/618/EC on the conclusion of the Trafficking Protocol, in so far as its provisions fall within the scope of Articles 179 and 181a EC, *OJ* 2006, L262/44; Council Decision 2006/619/EC on the conclusion of the Trafficking Protocol, in so far as its provisions fall within the scope of Part III, Title IV EC, *OJ* 2006, L262/51.
[57] Council Document 7603/05, 2. See also Council Document 5948/04, 4.
[58] Council Document 7603/05, 6.

declaration of competence, which moreover contains a clear reference to exclusivity: "In these fields [the crossing of the external borders and irregular migration] the Community has adopted rules and regulations and, where it has done so, it is hence solely for the Community to enter into external undertakings with third States or competent international organisations."[59]

The conclusion of the Palermo Protocols raises an additional question in relation to the Schengen Associated Countries (SAC). All SAC are parties to the Palermo Protocols and are thus bound by them under public international law. One may wonder to what extent a SAC is bound also as a result of its association with the Schengen *acquis*. In the same vein, one could ask what would be the consequences if a SAC does not wish to accede to an international agreement concluded by the EC in an area covered by the Schengen *acquis* in which the EC's external competences have become exclusive. The SAC's association with the Schengen *acquis* did not intend to limit in any way their external competences, but arguably the articles in the Association Agreements which state that in case a SAC does not accept a legislative measure adopted by the EC/EU legislator, the agreement is deemed to be terminated unless otherwise decided by the Mixed Committee, would have to be applied analogously.[60]

3.2 The Exportation of the EU Borders *Acquis* and Best Practices

The nature of implied powers, means that such external powers for the management of the EU external borders can only be considered to exist where external action relates back to the management of the EU's external borders. If one speaks of the promotion of the EU *acquis* or border management standards beyond the external borders in furtherance of external policy objectives, the competence for such external action must be found in one of the other legal bases provided for by the treaties. In practice, cooperation for the purposes of managing the EU's external borders is often linked to cooperation on a third country's more general system of border and migration management, confirming the idea that the EU is mobilising third countries as gatekeepers to the EU.[61]

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[59] Annex II of the Decisions enumerated *supra* note 56.

[60] Articles 8(4) and 11(3), Agreement concluded by the Council and Iceland and Norway concerning the latters' association with the implementation, application and development of the Schengen acquis, *OJ* 1999, L176/36 and Articles 7(4) and 10(3), Agreement between the EU, the EC and Switzerland on the association of Switzerland with the implementation, application and development of the Schengen acquis, *OJ* 2008, L53/52. See Chapter IV.

[61] See for instance the technical missions of the Commission and Frontex to Libya, during which not only cooperation for the management of the EU southern maritime sea borders was under discussion, but also the

In many third countries cooperation on external border management forms part of wider security sector reform.[62] It includes not only the modernisation of border management systems, including institution and capacity building, but often also the shift from a military border force to a civilian command structure.[63] The Council's 2004 Action Plan for Civilian Aspects of European Security and Defence Policy (ESDP) for the first time also included border control.[64]

External action on border management may be covered by policy areas as diverse as enlargement, development cooperation, association relationships, the Common Foreign and Security Policy (CFSP) or the fight against international terrorism and crime. That this may give raise to questions of (cross-pillar) competence is evidenced by the Philippines Border Management Case.[65] In this case, the ECJ specifically held that "border management is, as a rule, likely to increase the internal stability and security of the country concerned by leading to an improvement in the controls so far as concerns, in particular, the trafficking in arms, drugs and human beings, activities which undeniably constitute serious obstacles to economic and social development."[66] This was however not enough to bring a Commission project on border management in the Philippines within the scope of Regulation (EC) No 443/92 on economic development cooperation.[67] The Court held that "a project of institutional strengthening must, to be eligible as economic cooperation, be conspicuous for the existence of a direct connection with its aim of strengthening investment and development," the objective of the Commission project was however the fight against terrorism and international

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upgrading of Libya's southern land borders: Council Document 7753/05 and the Report of the Frontex-led EU Illegal Immigration Technical Mission to Libya, 28 May-5 June 2007, 17-18.

[62] COM(2006) 253 final, Commission Communication, 'A Concept for European Community Support for Security Sector Reform,' 5. See also Hills, A., 'Border Control Services and Security Sector Reform' (Geneva, DCAF Working Paper 37, July 2002).

[63] See for a discussion of the Turkish case: Kiricşci, K., 'Border Management and EU Turkish Relations: Convergence or Deadlock?' (Firenze, EUI RCSAS, CARIM Research Report 3/2007) and the Ukrainian case: Gatev, I., 'Border Security in the Eastern Neighbourhood: Where Bio-politics and Geopolitics Meet', 13 *EFARev* 1 (2008), 97-116. Hills questions whether the Schengen border *acquis* is actually suitable for exportation in the context of the Western Balkans: Hills, A., 'The Rationalities of European Border Security', 15 *European Security* 1 (2006), 85. While Hills has referred to differences in "political imperatives, functional necessities and social realities", Frontex has acknowledged the distinct geographic characteristics of the southern Libyan desert border: Frontex Report, *supra* note 61, 18.

[64] Council Document 10307/04, 3.

[65] Case C-403/05, *European Parliament* v. *Commission* ("Philippines Border Management") [2007] ECR I-9045.

[66] *Ibid*., para. 64.

[67] Regulation (EC) No 443/92, on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America, *OJ* 1992, L52/1. This Regulation has now been repealed and replaced by Regulation 1905/2006/EC establishing a financing instrument for development cooperation, *OJ* 2006, L378/41.

crime, which were not covered by that Regulation.[68] It should be noted that, as Cremona has pointed out, the Court here was interpreting the Regulation rather than ruling that the Community's competence in development aid cannot cover questions of border management in relation to the fight against terrorism. This aim had however been consciously excluded from the scope of the Regulation, "implementing power being no substitute for legislative revision."[69]

In relation to its direct neighbourhood, three different groups of countries can be distinguished. First of all there are the candidate countries: Croatia, FYR of Macedonia and Turkey. Negotiations are under way with these countries and the process leading up to accession entails the transposition and implementation of the *acquis communautaire*, including the rules on migration and border management, in their legal order. Accession partnerships establish the priorities for reform and pre-accessions support. Council Decisions lay down the principles, priorities and conditions for the individual countries. It may come as no surprise that in each of these decisions reference is made to border management.[70] Annual progress reports contain sections on the progress made in this area, including the reform of border guards services and the development of border infrastructure.[71]

A second group consists of the remaining Western-Balkan countries, covered by the Stability and Association Process (SAP): Bosnia-Herzegovina, Serbia, Montenegro, Kosovo and Albania.[72] All have a prospect of accession, but negotiations have not yet started.[73] So-called European Partnerships establish priority areas for reform, fostering their integration with the EU and eventually allowing them to become candidate countries.[74] Again, Council Decisions lay down the principles, priorities and conditions for each country and here the need for improvement in the area of border management also features prominently.[75]

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[68] Case C-403/05, *supra* note 65, paras 66-68. The current framework for financial assistance related to border management is considered below.
[69] Cremona, M., 'Annotation of Case C-403/05,' 45 CMLRev (2008), 1738.
[70] See for instance Council Decision 2008/157/EC on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, *OJ* 2008, L51/4, Annex, Point 3.1, 'Short term priorities'.
[71] The Progress Reports for the candidate and potential candidate countries can be found online: http://ec.europa.eu/enlargement/press_corner/key-documents/reports_nov_2008_en.htm.
[72] The Stabilisation and Association Process is the EU's policy towards the Western Balkans, launched at the 1999 Zagreb summit and aiming at greater integration of the region with the EU. It combines contractual relationships (Stabilisation and Association Agreements), including trade preferences, with financial assistance.
[73] European Council Conclusions, Santa Maria de Feira, 19-20 June 2000, point 67, reaffirmed by the European Council Conclusions, Thessaloniki, 19-20 June 2003, point 40.
[74] See Council Regulation (EC) No 533/2004 on the establishment of European partnerships in the framework of the stabilisation and association process, OJ 2004, L86/1.
[75] See for instance Council Decision 2008/211/EC on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC, *OJ* 2008, L80/18, Point

A third group consist of the countries covered by the European Neighbourhood Policy (ENP). These are the countries in the near neighbourhood of the EU, both to the east and south, not all of which have a prospect to of membership. As was noted in Chapter IV the ENP was designed in order to avoid the emergence of new dividing lines on the European continent after the 2004 enlargement. It focuses on developing bilateral relations between the EU and individual third countries, within the framework of ENP Action Plans.

The ENP Action Plans are policy documents, setting out priorities and objectives, which are negotiated after the preparation of a Country Report by the Commission.[76] They are adopted as recommendations of the Association or Cooperation Councils set up under the Association Agreements or Partnership and Cooperation Agreements (PCA) already in force between the EU and the third countries concerned.[77] Under the ENP Action Plans these bodies are given the additional task of monitoring the implementation of the action plans. One of the advantages for the EU of the ENP Action Plans is that their "soft" status removes the need for a "hard" Treaty legal base, and thus does not raise competence questions.[78] However, where specific concrete action such as financial assistance, operational activity or the conclusion of an agreement with the partner country is envisaged, a legal base will need to be found.

It should be recalled that the Russian Federation is not covered by the ENP. Border management issues in relation to Russia are dealt with under the Common Space of Freedom, Security and Justice. In 2005 Russia and the EU agreed on a Road Map for the Common Space of Freedom, Security and Justice."[79]

All ENP Action Plans contain a heading on migration, which is subdivided into legal and illegal migration, readmission, visas and asylum and border management. Border management relates not merely to the external borders of the EU which adjoin the

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3.1. 'Short term priorities'. Note that the Commission has published Guidelines for Integrated Border Management in the Western Balkans (version January 2007): http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/publications/ibm_guidelines_en.pdf.

[76] The ENP Country Reports are published as SEC documents and are available at: http://ec.europa.eu/world/enp/documents_en.htm

[77] PCAs should not be mistaken for Association Agreements. They are non-preferential agreements, covering a wide range of political, economic and trade related issues: Van Der Klugt, A., 'Association, Partnership and Cooperation Agreements with East European Countries,' *Eipascope* 3 (1993), 4; Hillion, C., 'Partnership and Cooperation Agreements between the EU and the New Independent States of the Ex-Soviet Union,' 3 *EFARev* 3 1998, 399.

[78] For example, as to the extent to which specific Action Plan measures fall within the First, Second or Third Pillar. See Cremona, M. and Hillion, C., 'L'Union fait la force? The Potential and Limitations of the European Neighbourhood Policy' (Florence, EUI Law Working Paper 22, 2006).

[79] Road Map for the Common Space of Freedom, Security and Justice (Council Document 8799/05), see point 1.2 on cooperation on border issues. See also the Action Oriented Paper on Implementing with Russia the Common Space of Freedom, Security and Justice (Council Document 15534/1/06 REV 1).

neighbourhood country, but to the country's more general system of border management. In the ENP APs negotiated since 2006, there is however an important element linking back to the EU's external borders, namely the reference to enhanced cooperation between Frontex and the border guard authorities of the ENP country.[80]

A horizontal instrument that has been developed within the framework of the Global Approach to migration is the so-called Mobility Partnership.[81] Not unlike the ENP Action Plans, the Mobility Partnership brings together a set of disparate objectives (albeit all related to migration) in the form of a legally non-binding document. The Mobility Partnership is a joint declaration of a third country, the EC and interested Member States, which should act as an "open-ended, long-term framework based on a political dialogue."[82] This again does away with the immediate need for the identification of a specific legal basis. The instrument is also a recognition of the shared nature of competences in the area of migration and border management and an example of how these shared competence are managed.[83]

The choice for Cape Verde and Moldova as the first two countries with which to conclude such partnerships can be explained by their position along major immigration routes, as well as from the fact that they reflect both the southern and eastern dimensions of the Global Approach. As Parkes has noted in relation to the mobility partnership with Moldova they are first and foremost a product of the EU's migration policy with, notwithstanding appearances, little connection to the ENP.[84] Despite the attention to questions of legal migration and development, the term "mobility partnership" is rather deceptive. Border and migration control form at least an important element of the partnership.[85] Increased mobility seems to be the carrot for the active support of third countries in the EU's effort to fight irregular migration. In this context there is much emphasis on establishing cooperation with Frontex.[86] Commitments to achieve greater mobility are few and limited for

[80] Guild, E. *et al.*, 'State of the Art: the Nexus between European Neighbourhood Policy and Justice and Home Affairs' (Warsaw, CASE Reports No. 73/2007, April 2007). See for instance the ENP Action Plans for Lebanon and Egypt. All ENP Action Plans are available at: http://ec.europa.eu/world/enp/documents_en.htm#2.
[81] See the Council Conclusions of 10 December 2007 on mobility partnerships and circular migration in the framework of the global approach to migration (Council Document 16326/07, 25) and the Joint Declarations on Mobility Partnerships between the EU and Moldova and the EU and Cape Verde (Council Document 9460/08). See also the reference to "Mobility Packages" in COM(2006) 735 final, *supra* note 24, 7 and COM(2007) 248 final, *supra* note 32.
[82] Council Document 9460/08, point 14.
[83] Cremona, M., *supra* note 13, 22.
[84] Parkes, R., 'Mobility Partnerships: valuable addition to the ENP repertoire?' (Berlin, SWP Working Paper FG1, 2009/3, January 2009), 2.
[85] Indeed the Commission in COM(2008) 823 final on the Eastern Partnership speaks of "Mobility and Security Pacts", 5.
[86] Frontex concluded a working arrangement with the Moldovan Border Guard Service on 12 August 2008. Negotiations with the Cape Verdean Border Guard authorities are in course.

instance to the provision of information on legal channels of migration and the development of "a dialogue on short-stay visa issues to facilitate the mobility of certain categories of persons." The Annex to the partnerships concluded so far does contain a list of projects by participating Member States, including modest labour migration schemes. However, the overall effect of these schemes is unlikely to have a great impact, especially when - in the case of Moldova - off-set against increased border and migration control that results from the imposition of the Schengen *acquis* along the Moldovan-Romanian borders.[87]

3.3 Funding Instruments

The EU's external policies are financially backed by a number of financing instruments. In 2006 there was a drastic overhaul of the legislative framework for the funding of external assistance, which had thus far grown in an *ad hoc* manner.[88] There are now six instruments for external aid, most importantly:

1) the European Neighbourhood Partnership Instrument (ENPI), covering the ENP countries, as well as the Russian Federation and replacing the formerly existing regional funding programmes MEDA (for Mediterranean countries) and TACIS (former USSR, including Moldova);[89]
2) Instrument for Pre-Accession Assistance (IPA), replacing pre-accession aid programmes such as Phare (Central and Eastern European Countries) and CARDS (Western Balkans);[90]
3) Instrument for Development Cooperation (IDC);[91]

[87] Parkes, R., *supra* note 84, 3.
[88] VanderMosten, R., 'Managing migration action at EU-level: a multi-pillar and multi-heading challenge' (Paper presented in the EUI Migration Working Group, 1 March 2006), 4; COM(2004) 626 final, Commission Communication on the Instruments for External Assistance under the Future Financial Perspective 2007-2013.
[89] Regulation (EC) No 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, *OJ* 2006, L310/1; MEDA Programme, Council Regulation (EC) No 1488/96 on financial and technical measures to accompany the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, *OJ* 1996, L189/1; TACIS Programme, Council Regulation (EC, EURATOM) No 99/2000 concerning the provision of assistance to the partner States in Eastern Europe and Central Asia, *OJ* 2000, L12/1.
[90] Council Regulation (EC) No 1085/2006 establishing an Instrument for Pre-Accession Assistance, *OJ* 2006, L210/82; Phare Programme, Council Regulation (EEC) No 3906/89 on economic aid to certain countries of Central and Eastern Europe, *OJ* 1989, L375/11; Community Assistance for Reconstruction, Development and Stabilisation (CARDS), Council Regulation (EC) No 2666/2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, *OJ* 2000, L306/1.

4) Instrument for Stability, replacing most importantly the Rapid Reaction Mechanism;[92]

The IPA provides the financial assistance for the alignment of the candidate countries' border regime with the Schengen *acquis* and the improvement of border infrastructure and institutions.[93] The ENPI and the IDC cover financial support for projects and activities related to the improvement of third countries' systems of border management in more general terms. Article 2(2)(q) of the ENPI specifically refers to "ensuring efficient and secure border management," the IDC does so for Central Asia in Article 8(c).

The AENEAS Programme, which was phased out in 2007, has been replaced by a so-called thematic programme based on Article 1(2) of the IDC and elaborated in a Commission Strategy Paper.[94] Like its predecessor it aims to give "assistance to third countries to support them in their efforts to ensure better management of migratory flows in all their dimensions."[95] The Strategy Paper frankly states that the programme does not directly attempt to deal with the root causes of migration, which should be addressed by the broader geographical programmes such as the ENPI and the IDC itself.[96] Although the Programme covers third countries falling under the ENPI, the IDC and the European Development Fund (this latter covers the African, Caribbean and Pacific countries and the Overseas Countries and Territories), the Strategy Paper leaves little doubt that the focus is on migration towards the EU, showing once more the use of a "development" instrument in support of the EU's goal of controlling immigration flows.[97]

The Stability Instrument was adopted, unlike the Rapid Reaction Mechanism, on the basis of Article 179 (development aid) and 181a EC (assistance to third countries) rather than Article 308 EC. Its purpose is twofold. First, it allows the EU to respond swiftly to (emerging) crisis

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[91] Regulation (EC) No 1905/2006 establishing a financing instrument for development cooperation, *OJ* 2006, L 378/41.
[92] Regulation (EC) No 1717/2006 establishing an Instrument for Stability, *OJ* 2006, 327/1 (hereinafter: "Stability Instrument"); Council Regulation (EC) No 381/2001 creating a rapid-reaction mechanism, *OJ* 2001, L 57/5 (hereinafter: "Rapid Reaction Mechanism"). Two other instruments for Humanitarian Aid and Macro-Financial Assistance remained in force.
[93] Note also the continuing support under the so-called Schengen facility in Article 35 of the 2004 Act of Accession, *OJ* 2003, L236/33 provided for continuing support in this area and Article 32 of the 2007 Act of Accession, *OJ* 2005, L157/203.
[94] COM(2006) 26 final, Commission Communication on the Thematic programme for the cooperation with third countries in the areas of migration and asylum and the Annual Action Programme 2009 and 2010.
[95] COM(2006) 26 final, *ibid.*, 7
[96] Annual Action Plan 2009 and 2010 *supra* note 94, 5.
[97] *Ibid.*

situations in third countries, of both human or natural nature.[98] Secondly, in more stable conditions, it aims to address threats with a potentially destabilising effect and raise preparedness for potential crises.[99] The type of actions that can be financed under the Stability Instrument are very broad, and include a wide range of activities in areas that touch upon competences covered by the Second and Third Pillar.[100] Its preamble explicitly states that measures taken under the Stability Instrument, may be complementary to and should be consistent with CFSP objectives and measures adopted under Title VI EU.[101]

The entry into force of the Stability Instrument has considerably expanded the scope of the Community's funding activities in areas such as security sector reform and the fight against small arms and light weapons. The financing of the Philippines Border Management Project would not have been problematic under the Stability Instrument, considering that the Regulation specifically refers to the strengthening of institutions in the fight against terrorism and organised crime.[102] It was already clear from the ECJ's ruling in *Environmental Penalties* that Community legislation could cover subject matters falling under the Third Pillar. This was subsequently confirmed in *Ship Source Pollution* and, in relation to the Second Pillar, in *Small Arms and Light Weapons*[103] In the latter case the Court reiterated that where, upon examination of a measure's content and aim, it is possible to adopt a measure under the First Pillar, Article 47 EU prevents such a measure from being adopted under the EU Treaty.[104] Similarly, where a measures pursues simultaneously, equally important objectives partly covered by the EC Treaty and partly by the EU Treaty, Article 47 EU requires its adoption under the EC Treaty.[105]

Like its predecessors both the ENPI and the IPA include important regional and cross-border components. In as far as these relate to cross-border cooperation across the Schengen external borders, the EC's policy is to:

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[98] Article 1(2)(a), Stability Instrument. Under Article 6(2) of the Stability Instrument this support can now be provided up to 18 months, whereas under Article 8(2) of the Rapid Reaction Mechanism this was six months.
[99] Article 1(2)(b), Stability Instrument.
[100] See in more detail on the relation with development-CFSP in relation to the Stability Instrument: Hoffmeister, F., 'Das Verhältnis zwischen Entwicklungszusammenarbeit und Gemeinsamer Außen- und Sicherheitspolitiek am Beispiel des EG-Stabilitätsinstruments', *EuR* (Beiheft 2, 2008), 55-76.
[101] Recital 3, Stability Instrument.
[102] Article 4(1)(a), Stability Instrument.
[103] Case C-176/03, *Commission v. Council* ("Environmental Penalties") [2005] ECR I-7879, para. 48 and Case C-440/05, *Commission v. Council* ("Ship Source Pollution") [2007] ECR I-9097, see also Chapter VIII. Case C-91/05, *Commission v. Council* ("Small Arms and Light Weapons") [2008] ECR I-3651.
[104] Case 91/05, *ibid*, para. 60.
[105] *Ibid*., para. 77. In the case at hand, the Court concluded that Joint Action 2002/589/CFSP on the EU's contribution to combating the destabilising accumulation and spread of small arms and light weapons (*OJ* 2002, L 191/1) should have been adopted under the EC development cooperation policy (paras. 108-109).

> "(…) support sustainable development along both sides of the EU's external borders, to help decrease differences in living standards across these borders, and to address the challenges and opportunities following on EU enlargement or otherwise arising from the proximity between regions across our land and sea borders."[106]

On the one hand, one could consider this Cross Border Cooperation (CBC) element as a genuine concern for the need for regional development. On the other hand, implied also in the above quotation, the CBC is alleviating the negative consequences resulting from the imposition of the Schengen regime at the new external borders. The idea that "good fences make good neighbours" remains very much present. Cross-border cooperation is seen as a way to "prevent and combat common security threats in border areas."[107] One of the main objectives of the CBC is to ensure "efficient and secure borders," meaning that they facilitate *bona fide* cross-border movement, but perhaps most importantly prevent illegal border-crossings.[108]

Once more the role of individual Member States needs to be emphasised here. Bilateral agreements on questions of migration and border management often also include funding from Member States for activities in third countries. One of the clearest examples can be found in the Treaty on Friendship, Partnership and Cooperation between Italy and Libya.[109] In Article 19(2) the Italian government pledges to bear half of the costs for the development of a border control system at Libya's southern borders, and it is agreed that both parties will ask the EU for the other half.[110] Considering that many immigrants attempting to reach Europe by boat set sail from Libyan coasts, both Italy and the EU have an obvious interest in the development of such a system, again shifting control away from actual external Schengen borders.

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[106] ENPI, Cross-Border Cooperation Strategy Paper 2007-2013, Indicative Programme 2007-2010, 5.
[107] COM(2006) 253 final, *supra* note 62, 9.
[108] ENPI, Cross-Border Cooperation Strategy Paper 2007-2013, *supra* note 106, 11.
[109] The text of the 'Trattato di amicizia, partenariato e cooperazione' is annexed to the law authorizing its ratification and implementation (Law No 7,6 February 2009, *GU* No 40, 18 February 2009).
[110] This would probably have to be done under the ENPI, even if Libya is not a partner to the ENP. There are no bilateral legal ties between the Community and Libya. A piecemeal approach focussing on the "Benghazi HIV/AIDS crisis" and irregular immigration has proven largely unsuccessful. Negotiations to establish a more comprehensive EU-Libya framework agreement are currently taking place. See the concept note for the first Libya Country Strategy Paper and National Indicative Programme 2011-2013.

4. The Operational Character of the External Dimension of EU Border Management

In its Communication on the Reinforcing of the Southern Maritime Borders the Commission considered "building on existing relations and practical cooperation already established with the third countries, pursuing and strengthening our dialogue and cooperation with third countries on these operational measures (…)" as an important part of the overall approach.[111] The external action of the EU in the area of border management has a strong operational character. This external dimension is twofold. On the one hand, the EC's support to third countries' border management systems takes place through its financial instruments for funding external action, putting much emphasis on institution and capacity building, as well as the promotion of best practices. In some instances, border management projects go beyond providing mere financial and technical assistance, sending missions of border experts to third countries. On the other hand, the external dimension for the management of the external borders of the Schengen area itself is largely shaped at executive level. First of all through operational cooperation between Member States' border guards authorities and their counterparts in third countries, but increasingly also through the "external relations" of Frontex.

4.1 Border Management Missions in Third Countries

In this section we will briefly examine two examples of border management projects that have been set up by the EC in its neighbourhood: the EU Border Mission in Moldova and Ukraine (EUBAM) and the EU Border Management Programme for Central Asia (BOMCA).

In 2002, the BOMCA was launched by the EC Commission at the initiative of the Central Asia Border Security Initiative (CABSI), a consortium of EU Member States led by Austria. It was previously funded under TACIS and currently under the IDC.[112] In the words of the Programme's website:

[111] COM(2006) 733 final, Commission Communication, 'Reinforcing the management of the European Union's Southern Maritime Borders,' 4.
[112] Article 8(c), Regulation (EC) No 1905/2006, *supra* note 91.

> "Training and exposure to European Best Practices in Integrated Border Management (IBM) form the main component of the programme. IBM means intra-service, inter-agency and cross-border cooperation between Central Asian border management agencies."[113]

The BOMCA is one of the EC's largest assistance programmes and there are no other donors in the region with assistance programmes specifically aiming at the reform of border management.[114] The Programme focuses on institutional reform, the training of border guards and the improvement of infrastructure capacities in selected parts of the region. Local governments are encouraged to adapt their border rules and regulations, including demilitarisation.[115] BOMCA is closely related to another security programme in the region, the Central Asia Drug Action Programme (CADAP) and complementary to EU programmes in the area of customs, energy and transport.[116] Especially at the Tajik-Afghan border drugs as well as arms and human trafficking are of important concern to the EU.[117] Intensified securing of this border may however mean more barriers to the free movement of persons and goods, disrupting local trade and constituting an additional means of extraction for corrupted border guards officials.[118] It may also make it even more difficult for people in need of international protection to have access to asylum.

The EU generally works together with other international organisations, both inter-governmental and non-governmental.[119] For instance, BOMCA is implemented and co-financed by the United Nations Development Programme (UNDP). Another example can be found in the Western Balkans, where the Ohrid Process on Border Security and Management is a joint effort of five countries as well as the EU, the OSCE, NATO and the former Stability Pact (Regional Cooperation Council).[120] The EU further contributes financially to the so-

[113] http://bomca.eu-bomca.kg/en/about.
[114] The seventh phase of BOMCA has an estimated budget of 6 million Euro, see the ENPI Regional Action Programme 2006, Project Fiche Border Management in the NIC Countries, 11.
[115] See the ENPI Regional Action Programme 2005, Project Fiche 8 Border Management programme for Central Asia (BOMCA 6), 4.
[116] http://cadap.eu-bomca.kg/; See also: 'The EU and Central Asia: Strategy for a New Partnership' (Council Document 10113/07), endorsed by the European Council, Brussels, 21-22 June 2007.
[117] Matveeva, A., 'Central Asia: A Strategic Framework for Peace building' (London, International Alert, February 2006), 25. These also concern the US, which however has less leeway in relation to Russia and China and unlike the EU less long term interests: Kassenova, N, 'The New EU Strategy towards Central Asia: A View from the Region' (Brussels, CEPS Policy Brief no. 148, January 2008), 3.
[118] Matveeva, A., *ibid*, 59 and Matveeva, A., 'Tajikistan: Evolution of the Security Sector and the War on Terror,': in Ebnöther, A. *et al.* (Eds), Facing the Terrorist Challenge: Central Asia's Role in Regional and International Co-operation (Vienna, Bureau for Security Policy at the Austrian Ministry of Defence, April 2005), 138.
[119] See e.g. the ENPI Regional Action Programme 2006, *supra* note 114. To name but a few: OSCE, ICMPD, UNDP, UNHCR, IBRD (World Bank), IOM, ECRE.
[120] See the two founding documents of the Ohrid Regional Conference, 22-23 May 2003: the Way Forward Document and the Common Platform on Border Security and Management.

called Söderköping process, an initiative to promote dialogue on asylum and irregular migration issues among the countries situated along the EU eastern border, involving also the IOM, the Swedish Migration Board and the UNHCR.[121]

It follows from its name that the EU Border Mission to Moldova and the Ukraine (EUBAM) must be distinguished from the BOMCA: it is an on-the-ground operation within third country territory, rather than a mere programme for financial and technical assistance. As Benita Ferrero-Waldner, Commissioner for External Relation and the ENP, summed up:

> "We will deploy a number of mobile teams, consisting of approximately 50 border guards and customs officials from EU Member States, to the most relevant locations along the entire border, including the Transnistrian segment. These experts will make unannounced visits to any location on the Moldovan-Ukrainian frontier."[122]

On 2 June 2005, Presidents Voronin of Moldova and Yuschenko of Ukraine addressed a joint letter to Commission President José Barroso and the EU High Representative for the Common Foreign and Security Policy (CFSP), Javier Solana, requesting EU assistance on the Ukrainian-Moldovan border.[123] On 7 October 2005, Commissioner Benita Ferrero-Waldner signed a Memorandum of Understanding between the Commission and the governments of Moldova and Ukraine establishing a EU Border Assistance Mission (EUBAM).[124]

The overall objectives of the Mission, as stated in the Annex to the Memorandum, are to contribute to the EU policy towards Ukraine and Moldova, in particular as regards border management issues, to build up an appropriate operational and institutional capacity for effective border monitoring, to contribute to the settlement of the Transnistria conflict and to improve transnational cooperation in border management.

The EUBAM shows how internal and foreign policy goals come together in the ENP.[125] There is undoubtedly a strong link with the EU's CFSP in the region, if not to say

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[121] http://soderkoping.org.ua/page2864.html.

[122] Speech by Commissioner for External Relations Benita Ferrero-Waldner, 'Strengthening the partnership between the EU and its neighbours: Signature of EU-Moldova-Ukraine Memorandum of Understanding' (Palanca border crossing point, 7 October 2005).

[123] Already the ENP Action Plan for Ukraine stated that the country would develop co-operation with Moldova on border questions and would engage actively in the trilateral expert talks involving Ukraine, Moldova and the Commission, Chapter 2(1), point 14.

[124] Memorandum of Understanding of 7 October 2005 between the Commission, the Government of Moldova and the Government of Ukraine on the European Commission Border Assistance Mission to Moldova and Ukraine.

[125] Lavenex, S., 'EU External Governance in "Wider Europe"', 11 *JEPP* 4 (2004), 681.

that the EUBAM has clear CFSP objectives.[126] Kurowska and Tallis have described in detail how this led to disagreement between the Commission and Council on the control over the initiative.[127] The Commission argued that it should be in charge of the Mission because of its civilian character, while the Council considered this to be an infringement of its powers under the CFSP.[128] Reportedly, a lack of funds in the CFSP budget and Russian sensibilities as regards interference in its near neighbourhood, allowed the Commission to move ahead under the First Pillar.

The EUBAM's rather unclear legal framework reflects the dualistic character of the Mission. The EUBAM was initially funded under the Rapid Reaction Mechanism and subsequently the TACIS and ENPI. These funding instruments thus seem to constitute the Mission's legal basis. In addition the CFSP Joint Action appointing a special representative for Moldova was amended so as to include in its policy objectives the increased efficiency of customs and border management at the Ukraine-Moldova border and the Special Representative's mandate was extended to include the monitoring and promotion of cross-border cooperation in the region.[129] Still, the EUBAM is supervised by DG Relex and the EC delegation in Kiev, and the Mission reports directly to Brussels rather than through the EU's Special Representative.[130]

The Memorandum of Understanding is a legally non-binding agreement, also bearing in mind that "international law does not know the class of administrative agreements as a category distinct from that of international agreements."[131] Nonetheless, it regulates important questions regarding immunity, privileges and responsibilities.[132] The staff of the mission are accorded diplomatic immunity and equated with the Commission staff at the Commission's

[126] See also the remarks of Javier Solana, EU High Representative for the CFSP at the launch of the EU Border Mission for Moldova - Ukraine, Odessa, 30 November 2005 (Press Release, No S398/05, 2 December 2005).
[127] Kurowska, X. and Tallis, B., 'EU Border Assistance Mission: Beyond Border Monitoring?', 14 *EFARev* 1 (2009), 49 ff.
[128] Note that the European Union Border Assistance Mission for the Rafah Crossing Point (EUBAM Rafah) in Palestine was set up on the basis of a Joint Action under the ESDP (Joint Action 2005/889/CFSP, *OJ* 2005, L327/28) after the Palestinian Authority and the Israeli Government had addressed letters of invitation for the establishment of a border mission. The tasks of the EUBAM Rafah can in many aspects be compared to that of the EUBAM. It shall "contribute, through mentoring, to building up the Palestinian capacity in all aspects of border management". Also the EUBAM Rafah does not have executive tasks, although it does have the authority to ensure compliance with the terms of the 'Agreement on Movement and Access' between Israel and the Palestinian Authority of 15 November 2005 and may in that role order the re-examination and reassessment of any passenger, luggage, vehicle or goods.
[129] Article 1, Joint Action 2005/776/CFSP amending the mandate of the European Union Special Representative for Moldova, *OJ* 2005, L292/13.
[130] Kurowska, X and Tallis, B., *supra* note 127, 52.
[131] Opinion AG Tesauro in Case C-327/91, *France v. Commission*, delivered on 16 December 1993, para. 22.
[132] Article III and IV, Memorandum, *supra* note 124. Article IV(4) states that disputes on interpretation or implementation need to be resolved through negotiations.

representation in Ukraine and Moldova. The Governments of Moldova and Ukraine take full legal responsibility for the activities of the mission and its staff carried out under the Memorandum.

It is repeatedly stressed that the EUBAM is an "advisory, technical body" with no executive powers.[133] The Memorandum expressly states that the Mission and its staff: "have no authority to enforce laws and (…) [will] refrain from any action or activity incompatible with the advisory or audit nature of their duties."[134] EU Experts may however make unannounced visits to border locations and may request the Head of a Border Post to order the re-examination and re-assessment of goods subject to customs duties.[135] The Mission will furthermore "provide assistance" in preventing the smuggling of people and goods.[136] Kurowska and Tallis state in very critically terms that: "[i]t is unethical to disguise disciplinary practices as mentoring and to frame the buttressing of Fortress Europe as a success story of neighbourhood cooperation."[137] Without wanting to assess the EUBAM in those terms, they are right to observe that the Mission is presented as a mere technical exercise, while it is much more an expression of the EU's external policy interest in the region. Moreover, for Moldova and Ukraine the real interest in EU assistance may lie with the supply of border surveillance equipment rather than in the application of EU rules and standards at their borders. As the deputy chief of Ukraine's southern border command admitted, Ukraine is most interested in modern equipment for customs inspections and passport controls, as well as access to European information databases.[138] A 9 million Euro project, initially funded under TACIS and implemented by the EUBAM, allows *inter alia* for the purchase of equipment and communication systems.[139]

An interesting question is whether there could be a role envisaged for Frontex in the framework of the EUBAM. There is an obvious overlap in the respective organisations' activities, not only in terms of operational activities, but also training, albeit that Frontex's mandate is limited to the Schengen external borders. The Commission states that Frontex "has established a solid working relationship" with the EUBAM, but one may question how far

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[133] http://www.eubam.org/staticdownloads/eubam_brochure_en.pdf.
[134] Article II(2), Memorandum, *supra* note 124.
[135] Articles II(3) and II(5), Memorandum, *ibid*.
[136] Article II(6), Memorandum, *ibid*.
[137] Kurowska, X and Tallis, B., *supra* note 127, 60.
[138] 'Moldova: EU Launches First "Neighbourhood Policy" Border Mission In Post-Soviet Space' (*Radio Free Europe/Radio Liberty*, 9 October 2005).
[139] BOMMOLUK (Improving Management on the Moldovan-Ukrainian State Border), see: http://www.eubam.org/index.php?action=show&sid=<&id=192

there is in fact structural cooperation between the two organisations.[140] In terms of coherence and efficiency it would be only logical for Frontex to be given a much stronger say over the EUBAM, although admittedly its current legal framework does not allow for that. This is recognised in the EU's communication on the future role of the agency, which states that "[t]he mandate of Frontex as concerns cooperation with third countries is limited in the sense that projects aiming, for example, at technical assistance cannot be carried out by Frontex in third countries.[141] It continues by proposing in more general terms that "[a]t a later stage, and against the background of the Lisbon Treaty, a reflection could be initiated on what role the Agency can have regarding the participation in European border control missions conducted in third countries."[142] If this were to be the case, then more careful thought should be given to the question of immunities and responsibilities, especially if such missions were to involve the exercise of executive powers. As we shall see below some of these questions already arise in the context of joint operations in third country territorial waters.

4.2 Operational Activities at the External Borders

The suggestion that Frontex take on a role in border management missions conducted in third countries brings us to the second operational dimension of EU external action in the area of border management: the operational activities in cooperation with third countries for the management of the external borders of the EU itself. Article 14 of Regulation (EC) No 2007/2004 endows Frontex with the task of facilitating cooperation between Member States and third countries 1) in matters covered by its activities, 2) to the extent necessary required for the fulfilment of its tasks and 3) in the framework of the EU's external relations policy.[143]

The Agency may further conclude working arrangements with international organisations and the authorities of third countries competent in matters covered by the

[140] SEC(2008) 150, Statistical Data, document accompanying COM(2008) 67 final, Commission Report on the evaluation and future development of the FRONTEX Agency, 44.
[141] COM(2008) 67 final, Commission Report on the evaluation and future development of the FRONTEX Agency, 8. It must be assumed that this refers to third countries not bordering the EU, since third countries such as Ukraine are already eligible for funding for the participation in joint operations. Moreover, Frontex joint operations have been conducted in third country territorial waters, see below.
[142] COM(2008) 67 final, *ibid*.
[143] Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, *OJ* 2004, L349/1 (hereinafter: "Frontex Regulation").

Frontex Regulation.[144] This must be done "in accordance with the relevant provisions of the Treaty." This later condition is rather unclear and should probably be interpreted so as to mean that the Agency cannot conclude international agreements binding the Community, since for this procedures have been laid down in the Treaty (Article 300 EC).[145] As Ott rightly points out, the domestic legal personality of EU agencies has to be clearly distinguished from their lack of international legal personality.[146] Indeed, all Frontex working arrangements contain a stipulation that they do not constitute agreements under international law.

The Management Board has adopted a rather elaborate procedure for the conclusion of such working agreements.[147] The Executive Director presents a draft mandate with negotiation guidelines to the Management Board, after consulting with relevant Member States and the Commission. Once the Management Board has given a mandate, negotiations are carried out by the Executive Director, in practice the Agency's External Relations Officer. The Chair of the Management Board may support the Executive Director. Once negotiations have been concluded the Executive Director consults with the Commission prior to putting the arrangement before the Management Board. The Management Board adopts the final version of the working arrangement by absolute majority after which the Executive Director can proceed with signature. The prominent role of the Member States and the Commission can be easily explained, although it does not follow from the wording of Article 14 of the Frontex Regulation. The duty of loyal cooperation evidently entails obligations of information and consultation, but arguably Frontex's independent position should allow it greater freedom of action. At the same time the highly politicised environment in which Frontex acts would justify close scrutiny by the Commission and Member States.[148]

The Agency has concluded working arrangements with the relevant authorities of the Russian Federation, Ukraine, Croatia, Georgia, Moldova, Albania, Serbia, FYR Macedonia, Switzerland (now redundant in view of Switzerland's association with the Schengen acquis), Montenegro and the USA. The negotiation process is well advanced with the authorities of Turkey, Bosnia and Herzegovina, Senegal and Cape Verde. It has received a further mandate from the Management Board to negotiate working arrangements with the authorities from the

[144] Articles 13 and 14, Frontex Regulation.
[145] See Case C-327/91, *France v. Commission* [1994] ECR I-3641, paras 27-28.
[146] Ott, A., 'EU Regulatory Agencies in EU External Relations: Trapped in a Legal Minefield Between European and International Law', 13 *EFARev* 4 (2008), 519.
[147] Article 2, Frontex Management Board Decision of 1 September 2006 laying down the procedures for negotiating and concluding working arrangements with third countries and international organisations.
[148] Note that this is essentially the same dilemma that was observed in the previous chapter in relation to political influence over the Agency's decisions in relation to joint operations and/or the deployment of Rapid Border Intervention Teams.

Commonwealth of Independent States, Libya, Egypt, Morocco, Mauritania and Brazil. Although priority is given to potential EU-candidate countries, many of the countries Frontex is engaging with do not actually border the Schengen area. This could be justified by Frontex's competences in relation to air-borders, yet cooperation with these countries extends also to the exchange of information, training, capacity building and collaboration on relevant technologies.

Working Arrangements normally start out with a list of objectives, on which - along with the development of good relations and mutual trust - the fight against irregular migration and improved security at the borders feature prominently. This is followed by a general summing up of activities which may be developed in the framework of the Working Arrangement, ranging from information exchange to agreed points of contact, risk analysis and training to the coordination of joint operational measures and pilot projects.[149] Detailed terms and the conditions for joint operational activity can be found in the Financial Partnership Agreements which are concluded together with the working arrangement for the same duration. They are similar to the financial partnership agreements concluded between the Commission and third country beneficiaries on the basis of Title IV of the general Financial Regulation.[150] It is however striking to note that the Commission Regulation on the framework Financial Regulation for the bodies referred to in Article 185 of the general Financial Regulation is silent as to the "external action" of agencies.[151] Also the Frontex Regulation itself is silent on the point of giving financial assistance to third countries. The Agency has nevertheless co-financed the participation of third countries in joint operations.[152]

Frontex's "external relations" will of course have to be in conformity with the EU's external relations policy. The Commission Communication on the participation of ENP countries in EC Agencies and Programmes in this respect states that "[b]oth the priorities of external relations policies of the European Union and the priorities based on operational needs are taken into consideration when choosing partner countries."[153] Nevertheless there is a risk that "technical agreements" turn into a less transparent alternative for contacts at Commission

[149] The Working Arrangements have not been published, but have been made available to the author by Frontex upon a request for access.
[150] Council Regulation (EC, Euratom) 1605/2002 on the Financial Regulation applicable to the General Budget of the European Communities, *OJ* 2002, L248/1. See also Title III of Commission Regulation (EC, Euratom) No 2342/2002 laying down detailed rules for the implementation of the general Financial Regulation.
[151] Commission Regulation (EC, Euratom) No 2343/2002 on the framework Financial Regulation for the bodies referred to in Article 185 of the general Financial Regulation, *OJ* 2002, L357/72.
[152] See for instance the participation of Ukraine in the series of joint operations Ursus I-IV, carried out in July-December 2007.
[153] COM(2006) 724 final, Commission Communication on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes, 7.

level, allowing for progress to be made in the specific area of external border management, whilst ignoring the broader and potentially more sensitive political context of the relations with specific third countries. Moreover, rather controversial assistance, for instance the supply of border management equipment to third countries with a less than perfect human rights record, could be channeled through the Agency, without implicating the Commission.

Although the Frontex Working Arrangements certainly have the potential of becoming important instruments of cooperation between the EU and third countries in the area of external border management, the continuing importance of practical cooperation agreements between Member States and third countries cannot be underestimated.[154] Article 2(2) of the Frontex Regulation and Article 16(3) SBC explicitly stipulate that: "without prejudice to the competencies of the Agency, Member States may continue cooperation at an operational level with other Member States and/or third countries at external borders, where such cooperation complements the action of the Agency." As always, they are under a duty of loyal cooperation. Member States must refrain from activity that could jeopardise the Agency's functioning or the attainment of its objectives and they must report to the Agency on these operational matters.

Member States may be in a better negotiating position vis-à-vis third countries, tying operational cooperation into a package deal with additional benefits for third countries. In fact many of the bilateral agreements between individual Member States and third countries on questions of migration, refer to cooperation in border management.[155] The Commission in this respect also supports the Agency by underlining the importance of cooperation with Frontex in its broader relations with third countries, such as for instance in the ENP Action Plans or Mobility Partnerships. In practice however, the operational cooperation between Member States and third countries most often takes place on the basis of rather informal cooperation arrangements, such as memorandums of understanding as opposed to fully fledged international agreements. It must be questioned to what extent Frontex is indeed informed on a structural basis by the Member States on their bilateral initiatives. Importantly, the Agency does not dispose of an overview of all existing (informal) arrangements between the Member

[154] There are many examples. For just a few, see: Spanish Ministry of the Interior, 'Alonso se reúne con el Rey Mohamed VI y con su homólogo Mustapha Sahel para reforzar la cooperación bilateral' (Press Release, 17 February 2005); 'Latest International Cooperation the Border Guard Service of Latvia' (5 March 2007): http://soderkoping.org.ua/page12824.html; 'Cooperation between border guard services of Poland and Ukraine' (6 March 2007): http://soderkoping.org.ua/page12984.html;.

[155] See for instance Article 19(1) of the Trattato di amicizia, partenariato e cooperazione, *supra* note 109 or Article 8 of the 'Acuerdo marco de cooperación en material de inmigración entre el Reino de España y la República de Cabo Verde', *BOE* No 39, 14 February 2008, 8028.

States and third countries, even where these have formed the basis for Frontex coordinated activities in the territorial waters of third countries.

5. Taking to the High Seas and Beyond: Extra-territorialising Border Control

Much of the attention of the public, and as a consequence of Member States' politicians and EU policy makers, has been on the situation at the southern maritime borders of the EU. Some of the most costly joint operations that have been co-financed by Frontex are maritime operations aiming to kerb migration flows departing from the African continent, as well as the Turkish coasts.

We have already observed that the EU aims to improve the border management systems of countries of origin or transit of irregular migration to the EU as a means of tackling irregular migration at as early a stage possible. The imposition of visa obligations and carrier sanctions has a similar aim of preventing irregular migration "at the source." By making it increasingly difficult for people to actually reach EU territory, the Member States try to avoid the responsibility for asylum claims or the - in practice often impossible - removal of irregularly present third country nationals. In this respect, the Frontex-coordinated joint operations at sea form a variation on a familiar theme. The patrols on the High Seas and in the territorial waters of third countries from which irregular migrant boats depart mean that the physical surveillance of the external borders has also moved upstream.

The rather elaborate discussion that follows below will to some extent exceed the scope of this chapter. It serves not only to illustrate the external dimension of the EU's external borders policy, the operational dimension thereof and the interaction between third countries, Member States and the Community. It is also intended to support a more general argument, which holds that although the control-based focus on the external borders may be explained from a lack of substantive harmonisation in the area of immigration and asylum rules, in the absence thereof, as well as in the absence of a common interpretation of internationally binding rules, any common external border policy is necessarily flawed.

5.1 Territorial Scope of the Schengen Borders Code and Frontex Regulation

Joint patrols taking place outside the territorial waters of the Member States raise the question of the territorial scope of both the Schengen Borders Code (SBC) and the Frontex Regulation.

Article 3(1) of the Frontex Regulation is titled "Joint operations and pilot projects at external borders." It is questionable how far one can consider the High Seas or third country territorial waters to fall under this article. The definition of external borders in Article 1(a)(1) of the Frontex Regulation differs slightly from that in Article 2(2) of the SBC, in referring to the borders to which "the provisions of Community law on the crossing of external borders" applies.

Interestingly, the Decision establishing the External Borders Fund (EBF) in Article 14(6)(b) defines the "external maritime borders" as "the outer limit of the territorial sea of the Member States as defined according to Articles 4 to 16 of the United Nations Convention on the Law of the Sea (UNCLOS). However, in cases where long range operations on a regular basis are required in order to prevent irregular migration/illegal entry, this shall be *the outer limit of high threat areas*. It does add that this definition of external maritime borders is used exclusively for the purposes of the EBF.

It is clear that both the SBC and the Frontex Regulation apply in the territorial waters of the Member States. According to Article 3 of UNCLOS these waters may extend up to 12 miles. Countries may claim on the basis of Article 33 UNCLOS an additional 12 mile contiguous zone to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations."[156] One could argue that this provision allows for the application of both the SBC and the Frontex Regulation also in this area of the High Seas.

More questionable is the extension beyond the contiguous zone. From one point of view the territorial scope of the application of the SBC flows from its material scope of application, meaning that it applies wherever border control or surveillance takes place.[157] This interpretation would have the positive effect of making all the procedural safeguards that are contained in the SBC relating to a refusal of entry applicable to border control activities outside the EU territory. However, one may question this interpretation on the basis of the territorial scope of the EC Treaty. Such interpretation would also leave unanswered the more fundamental question regarding the jurisdiction of Member States' border guards authorities under public international law at sea and Frontex's coordinating powers.

[156] Note that not all Member States have declared such a contiguous zone, e.g. Italy. See however Article 6, Decree of the Italian Minister of the Interior of 14 July 2003, 'Disposizioni in materia di contrasto all'immigrazione clandestine', *GU* No 220, 22 September 2003, referring to immigration control in the contiguous zone.

[157] ECRE, 'Defending Refugees' Access to Protection in Europe' (London, December 2007), 24.

5.2 Joint Operations on the High Seas.

Unlike for instance in the case of piracy, UNCLOS does not expressly allow for the shipping authorities of a State other than the flag State to take action against a ship on the High Seas and inspect it on illegal immigration grounds. Irregular migration is often carried out in unseaworthy boats, without nationality. Article 110 UNCLOS allows for the boarding and inspection of a ship that does not fly a flag, although there is no consensus as to what consequences can be attached if it is established that a ship is indeed without nationality. According to one view only vessels in possession of a nationality enjoy the freedom of navigation and a flagless ship enjoys no protection.[158] Others point out that different connecting factors for the exercise of jurisdiction over the ship need to be taken into consideration such as the nationality of the owner or the passengers on board.[159] Article 110 UNCLOS has nonetheless served as the legal basis upon which Member States' ships during joint operations have intercepted boats suspected of carrying irregular migrants.[160]

Article 8(1) of the Palermo Protocol on Migrant Smuggling states that "[a] State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, *that is without nationality* or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in *suppressing the use of the vessel for that purpose*."[161] It continues in Article 8(7) that "[a] State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel". If evidence confirming the suspicion is found, that State Party shall take *appropriate*

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[158] Lauterpacht, H. (Ed.), *Oppenheim's International Law* (London, Longmans, 1948), 546. See the Ruling of the Privy Council in *Naim-Molvan v Attorney General for Palestine* [1948] AC 351.

[159] Shearer, I. (Ed.), *O'Connell's The International Law of the Sea* (Oxford, Clarendon Press, 1984), 755-757 and Churchill, R. and Lowe, A., *The Law of the Sea* (Manchester, Manchester University Press, 1999), 214.

[160] Council Programme of measures to combat illegal immigration across the maritime borders of the European Union (Council Document 13791/03), 6. Interception is understood as any action taken against a vessels suspected of carrying irregular migrants. Note that there is no definition of interception in international law. The UNCHR Executive Committee has given the following, very broad description: interception is one of the measures employed by States to:

i. prevent embarkation of persons on an international journey;
ii. prevent further onward international travel by persons who have commenced their journey; or
iii. assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law;

where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the travelling public as well as persons being smuggled or transported in an irregular manner": Conclusion on Protection Safeguards in Interception Measures. (No 97 (LIV) - 2003).

[161] Palermo Protocol on Smuggling, *supra* note 56. Emphasis added.

measures in accordance with relevant domestic and international law. The extent of the rights that this article confers on the intervening state are however not entirely clear. The phraseology "suppressing the use of the vessel" or "take appropriate measures" seem to imply the possible use force. This must however be a means of last resort and will be subject to the requirement of necessity and proportionality.[162] It must in any case be doubted whether this article can provide a solid legal basis for the exercise of jurisdiction over the people on board the vessel.

Article 3(a) of the Protocol defines smuggling as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." Consequently, the act of smuggling does not require the actual illegal entry of the person being smuggled. This could lead to questions of evidence before the national courts.[163] Some Member States, such as Italy, do not interfere with vessels suspected of carrying irregular migrants until they have entered the territorial waters.[164] Others such as France have made provision in their national laws granting them jurisdiction over ships on the High Seas which are bound for their territory, or that of other Schengen Member States, with the purpose of disembarking its passengers irregularly.[165] Spain in its Criminal Code has included irregular migration in the list of offences covered by universal jurisdiction.[166] Member States may however be reluctant to exercise this jurisdiction, since although they may be eager to prosecute the smugglers, they are much less willing to take responsibility for the people on board the vessel.[167]

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[162] Here the leading cases are *The I'm Alone* (*RIAA* Vol. III (1935), 1609) and *Red Crusader* (35 *ILR* (1962), 485).

[163] See however the ruling of the Spanish Tribunal Supremo (Penal Section), No. 618/2007, 26 June 2007, 4-5, which without much motivation stated that an intercepted *cayuco*, a traditional boat commonly used by irregular migrants destined for the Canary Islands, was "undoubtedly" heading for Spanish territory and that its purpose to enter illegally was "evident."

[164] Until entry into the territorial waters a vessel suspected of carrying irregular migrants will be followed unnoticed: Article 5(3), Decree of 14 July 2003, *supra* note 156.

[165] Article 12, Loi No. 2005-371 modifiant certaines dispositions législatives relatives aux modalités de l'exercice par l'Etat de ses pouvoirs de police de mer, *JORF* No 95, 23 April 2005, amending Title III of Loi No 94-589 relative aux modalités de l'exercice par l'Etat de ses pouvoirs de contrôle en mer, *JORF* No. 163, 16 July 1994, 10244, see Article 22. This can be compared to the approach adopted in USA law in relation to the trafficking of drugs destined for the USA: Maritime Drug Law Enforcement Act 1986, 46 *USCA* §1903.

[166] Article 2, Ley Orgánica No. 13/2007 para la persecución extraterritorial del tráfico ilegal o la inmigración clandestina de personas, *BOE* No 278, 20 November 2007, 47334 amending the Ley Orgánica 6/1985 del Poder Judicial, *BOE* No 157, 2 July 1985, 20632, see Article 4(g).

[167] A similar situation has arisen in the context of the fight against piracy off the coast of Somalia. States have been hesitant to exercise jurisdiction over pirates for fear of having to deal with asylum claims by suspected pirates or of not being able to return the pirates to Somalia after they have served their penalty. 'Pirates can claim UK asylum' (*The Times*, 13 April 2008). There have been calls to set up an International Tribunal for Piracy: 'High time for piracy tribunal, experts say' (*NRC Handelsblad/International*, 20 April 2009).

Member States' responsibility would entail the processing of any asylum claim put forward and the return of others. Having committed no other offence than irregularly crossing a Member State's border, migrants can be detained for a limited period of time only, after which they have to be either returned or released. In Spain this has been 40 days and many of the irregular migrants that have arrived in the Canary Island have been issued with a deportation order and transferred to mainland Spain, where they have disappeared in the shadow economy.[168] In Malta detention can be up to 18 months, however once finally released the possibilities for irregular migrants to be absorbed into the small island's informal economy are very limited.[169] The "Returns Directive" sets the limit for detention for the purpose of removal at six months, however Member States may choose not to apply the directive to people who have been refused entry at the border or who are apprehended or intercepted in connection with the irregular crossing of the external borders.[170]

It is not entirely clear to what extent the Member States engage in diversions of vessels on the High Seas.[171] Frontex's standpoint has always been that during joint operations no diversions take place, although some of the Agency's staff in more informal discussions have advocated such an approach. Reports by human rights organisations indicate that the border guard authorities of a number of Member States do actively divert ships carrying migrants and asylum seekers.[172] This practice entails not only a real risk to the life and safety of the passengers on board these often unseaworthy ships, but as regards possible asylum seekers on board, it also risks violating the right to claim asylum and the prohibition of *refoulement*.

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[168] 'Illegal migrants "dumped on city streets" in Spain' (*The Telegraph*, 28 August 2006). A planned reform of Spain's immigration law proposes to extend this period to 60 days, with a possible extension of 10 days in exceptional circumstances, which would include the not very exceptional situation in which there are delays in the return procedure (Article 56, Anteproyecto del Ley de Reforma de la Ley Orgánica 4/2000 de Derechos y Libertades de los Extranjeros en España y su Integración Social).

[169] See also 'UN experts express concern at length of custody for illegal migrants in Malta' (*UN News Centre*, 29 January 2009). In fact Malta is hardly ever the preferred destination of irregular migrants due to its strict rules on irregular migration, long detention periods, small absorption capacity and limited possibilities to act as a gateway to the EU.

[170] Article 2(2), Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country, *OJ* 2008, L 348/98 ("Returns Directive").

[171] Diversion is used here in the meaning of diverting the course of a ship back to its point of departure or another third country, through the use of force or threat thereof.

[172] Proasyl, '"The truth may be bitter, but it must be told": The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard' (Frankfurt am Main, October 2007). French law seems to explicitly allow for diversions in Article 21(II) of Loi No. 94-589, *supra* note 165.

5.3 Joint Operations in the Territorial Waters of Third Countries

Because of the legal difficulties of intervention on the High Seas, Member States are increasingly focussing on cooperation with third countries, concluding agreements that allow them to patrol the territorial waters of third countries from whose coasts immigrant boats depart.[173]

Frontex joint operations in third country territorial waters underline once more the continuing importance of Member States' bilateral relations with third countries. Frontex as such does not have any working arrangements in place which allow for joint operations in third country territorial waters. Rather, where joint operations of this kind have taken place, the legal basis for these operations have been bilateral agreements between a Member State and the third country in question. The Commission Communication on the reinforcement of the Southern Maritime Borders suggests that regional agreements be concluded to "define the right of surveillance", avoiding the need for agreements for each individual operation."[174]

Often, the Member States' bilateral agreements are not really international agreements. Rather they are non-binding Memoranda of Understanding between the ministries of the interior. This means that they escape parliamentary scrutiny in the Member States. Frontex, after initially denying that it was in possession of the agreements of Spain with Mauritania and Senegal which formed the legal basis for the so-called Hera Operations coordinated by Frontex in the coastal waters of these countries, has denied access to the text of these agreements after consultation with the Spanish authorities.[175] Only with Cape Verde does Spain has a fully fledged bilateral agreement in place that allows for joint patrols in the territorial waters of this island state.[176] Article 6(2) of this Agreement specifically refers to the possibility of patrols being integrated in the context of Frontex joint operations. It is important to note that the patrols are carried out in cooperation with Cape Verde. Article 3(1)(b) clearly states that where patrols are carried out with Spanish assets the effective presence of a Cape Verdean official is compulsory. This latter option resembles the so-called "ship rider

[173] See the introductory comment above by former Italian Minister of the Interior Guiliano Amato, *supra* note 1.
[174] COM(2006) 733 final, *supra* note 111, 10.
[175] From press sources it follows that a number of different "Memoranda of Cooperation" between the Spanish and Senegalese Ministries of the Interior have been the basis of the Hera operations. A first one dates back to August 2006, a second was agreed in September 2006 followed by a Joint Declaration in December 2006 and the Prolongation of this previous agreement in May 2008. A first Memorandum of Cooperation between the Spanish and Mauritanian Ministries of the Interior also dates back to August 2006.
[176] Acuerdo entre España y Cabo Verde sobre vigilancia conjunta de los espacios marítimos bajo soberanía y jurisdicción de Cabo Verde, *BOE* No 136, 5 June 2009, 47545.

agreements", which are a common feature in the USA's fight against drugs trafficking in the Caribbean.[177] Officers from Senegal and Mauritania have also been present on the Member States' vessels during the Hera operations.[178]

Italy has also been very active in negotiating operational cooperation arrangements with third countries. Throughout the 1990s the country experienced considerable inflows across the Adriatic of irregular migrants departing from the Albanian coasts. In 1997 it concluded a number of agreements with Albania which allowed the Italian coast guard to effectively impose a naval blockade in Albanian territorial waters and to act in international waters against any vessel "flying the Albanian flag or of ships anyhow 'connected' with the Albanian State."[179] Not unlike the Spanish government, the Italian government has systematically refused to publish most of the treaties and technical agreements that form the basis for operational cooperation.[180]

In accordance with Article 19(1) of the 2008 Treaty on Friendship, Partnership and Cooperation Italy and Libya are to reinforce their cooperation on irregular migration, referring back to an earlier Agreement of 13 December 2000, and in particular the implementing Protocol on Cooperation in the Fight against Irregular Migration between Italy and Libya, concluded on 29 December 2007.[181] Article 2 of the Protocol foresees in joint Italian and Libyan patrols in Libyan territorial waters, as well as international waters, whilst Article 3 expresses Italy's intention to provide Libya with its own patrol vessels.

From the point of view of public international law an international agreement is not a prerequisite for the patrol of one State in the territorial waters of another; the consent of the coastal state, being sovereign over its territorial waters, suffices. The question of legality of patrols in the territorial waters of third countries is therefore one for the Member States' domestic legal order and - in relation to the coordinating activities of Frontex – for the Community legal order. Although it is clear that the SBC cannot find application in third country territory, Article 14 of the Frontex Regulation could provide the legal basis for the Agency's coordinating activities, although only if the category "matters covered by its

[177] Byers, M., 'Policing the High Seas: the Proliferation Security Initiative, 98 *AJIL* 3 (2004), 538-539.
[178] 'HERA 2008 and NAUTILUS 2008 Statistics' (Frontex News Release, 17 February 2009).
[179] Pastore, F., '*Conflicts and Migrations: A Case Study on Albania* (Rome, CeSPI Occasional Paper, January 1998), 9.
[180] The legalitly of this practice is questioned by Favilli, C., 'Quali modalità di conclusione degli accordi internazionali in materia di immigrazione?', 88 *RDI* 1 (2005), 160-161.
[181] Trattato di amicizia, partenariato e cooperazione, *supra* note 109; Accordo tra il Governo Italiano e Libia, per la collaborazione nella lotta al terrorismo, alla criminalitá organizzata, al traffico illegale di stupefacenti e di sostanze psicotrope ed all'immigrazione clandestina (*GU* No. 111, 15 May 2003). The Protocol has not been published.

activities" is interpreted broadly, so as to include extra-territorial border surveillance and they are considered necessary for the fulfilment of the Agency's tasks.

5.4 Rescue of Life at Sea

Two factors complicate the legal framework sketched above. The first factor stems from the fact that many of the boats that are used for irregular migration are unseaworthy and/or overloaded and as a result are at risk of perishing at sea. This brings into play the international rules on search and rescue at sea, which apply irrespective of the jurisdictional maritime zone in which the boat finds itself. The obligation to render assistance to save life at sea is laid down in Article 98 UNCLOS and further worked out in the 1974 Convention on Safety of Life at Sea (SOLAS Convention) and the 1979 Search and Rescue Convention (SAR Convention). This obligation applies to all ships at sea, so also to Member States' assets participating in Frontex joint operations. However, SAR operations as such are not only outside the scope of Frontex's competences, they are outside the scope of competence of the EC/EU. If in the course of a Frontex joint operation a search and rescue (SAR) situation arises, the coordination is taken over by the Rescue Coordination Centre of the country responsible for the Search and Rescue Region (SRR) in which the persons in distress are located.

One problem with the SAR regime is that there is no uniform interpretation of the rules contained in the Conventions. First, there is no clear definition of "distress", the assessment of which is left to the ship master. Some Member States, such as Malta, do not consider a ship to be in distress unless there is a call for help and there is immediate danger to life and safety of persons on board. Other Member States, like Italy, will "forcibly" rescue passengers aboard unseaworthy ships, taking into account the likelihood that such a vessel will eventually be in need of salvation. These differing interpretations have hindered the drawing up of operational plans for Frontex joint operations taking place in the SRR of Malta, in which Italy has participated. As a result, Italy and Malta have applied the SAR regime each in accordance with its own different definition of distress.

Another complication relates to the responsibility for disembarkation. On more than one occasion have coastal states refused the disembarkation of people rescued at sea,

unwilling to take the responsibility for asylum requests or return procedures.[182] To tackle this problem amendments to the SAR and SOLAS Convention were adopted. They entered into force on 1 July 2006, with two EU Member States, Finland and Malta, objecting.[183] Article 4.1-1 SOLAS, as amended, provides that:

> "The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the [IMO]."

Article 3.1.9 SAR, as amended, is drafted in identical terms.[184] The purpose of the amendments is to ensure that in each situation a place of safety is provided within a reasonable time.[185] The responsibility to ensure that a place of safety is provided, falls on the Contracting Party responsible for the SRR in which the persons were rescued, which however does not mean that it is under an obligation to disembark survivors in its territory. Malta has argued that the *nearest* port of safety should be taken as a central concept.[186] As Malta has argued, the current rules are unclear as to the responsibilities of Contracting Parties who are not responsible for the SRR in which the rescue has taken place, but who are geographically close by.[187] Considering the enormous breath of the Maltese SRR one can easily understand Malta's stance. An additional problem is caused by the fact that many rescue operations occur in the SRR of Libya, which although a party to the SAR Convention, has not effectively implemented it.[188]

Whilst Libya has so far refused to assume its obligations under the SAR convention, Mauritania and Senegal have agreed to accept people rescued in the Senegalese SRR. This

[182] Most (in)famous is the Tampa case in which Australia refused a ship carrying rescued Afghan asylum seekers to dock: 'Australia defiant in refugee standoff' (*BBC News*, 31 August 2001).
[183] MSC Resolutions 153(78) and 155(78), MSC 78/26/Add. 1, Annex 3 and 5 respectively.
[184] The 'Guidelines on the treatment of persons rescued at sea' were adopted together with the Amendments: Resolution MSC Resolution 167(78), MSC 78/26/Add.2, Annex 34.
[185] Defined in Point 6.12 of the Guidelines, *ibid.*, as "a location where rescue operations are considered to terminate. It is also a place where the survivors. safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors. next or final destination.
[186] See the comments submitted by Malta to the IMO Sub-Committee on the Flag State, 27 February 2009.
[187] This resulted for instance in a four-day diplomatic stand-off between Malta and Italy over the responsibility for the irregular migrants rescued by a Turkish vessel, the Pinar, close to Lampedusa, yet in the Maltese SRR: 'Italy takes in stranded migrants' (*BBC News*, 19 April 2009).
[188] This led Malta to refuse a Spanish trawler who had rescued a group of Eritrean migrants in the Libyan SRR, to dock. Eventually different Member States, including Malta and Spain, took in migrants: 'Malta migrants allowed on shore' (*BBC News*, Friday 21 July 2006).

has in great part contributed to the success of Frontex operations in the Atlantic.[189] Quite cynically one could argue that in the Atlantic the SAR regime has functioned as a means of concealed diversion. However, the state of the vessels used for the crossing to the Canary Islands seems to justify their interception, as should be the case in the Mediterranean. In the previous chapter we have already noted how the responsibility for people taken on board in the course of joint operations is a point of concern and contention amongst the Member States participating in a joint operation; the availability of a third country place of safety should not however be allowed to determine whether or not to engage in a SAR operation.

The disagreement on the interpretation of "distress" and on the rules for disembarkation has had as a consequence that Member States participating in joint operations have assumed responsibility for persons rescued in the SRR of other Member States or even third countries. One could wonder to what extent Malta (and Finland for that matter) are under a Community obligation to accept the amendments to the SAR and SOLAS Conventions agreed by the other Member States. The ECJ in its early *Kramer* judgment held that Member States are not only obliged not to enter into any commitment which could hinder the Community in carrying out its tasks, but imposed also a positive obligation to proceed by common action in international forums covering issues of Community competence.[190] In the *IMO* Case the Court held that a Member State cannot take initiatives within an international organisation which are likely to affect Community rules adopted for the attainment of Treaty objectives.[191] In both cases however, the Member States involved were acting in an area of exclusive Community competence. Not only is it unclear to what extent the external competence for the management of the external borders has become exclusive; the SAR amendments relate to life and safety at sea, an area outside EC competence, which only indirectly hinders the implementation of the Community policy for the management of the external borders.

In fact the successful operation of the SAR regime is under considerable pressure. According to Frontex officials, migrants repeatedly create SAR situations themselves in order to secure a "safe passage".[192] More importantly, recurring disagreement over the disembarkation of rescued migrants may disincline ship masters to come to the rescue. The

[189] Mauritania does not have its own SRR, but accepts people rescued in its territorial waters and contiguous zone.
[190] Joined Cases 3, 4 and 6/76, *Kramer* [1976] ECR 1279, paras 44-45.
[191] Case C-45/07, *Commission v. Greece* (IMO) [2009], ECR I-0000, *nyr*, paras 29-30.
[192] Informal discussions with members of the Frontex staff.

prosecution for human smuggling of shipmasters who claim to have engaged in a SAR operation is another discouraging factor.[193]

5.5 Rules on Asylum

The second factor complicating the legal framework results from the "mixed" character of migration flows across the EU's southern maritime border, meaning that amongst irregular migrants there are people who have well-founded claims for asylum or are entitled to some other form of international protection.[194] This brings into play a second set of obligations, namely the rules on asylum and international protections and in particular the obligation of *non-refoulement*.[195] These rules may apply simultaneously to the rules on SAR.[196]

Within the territorial sea of a Member State, one could argue that the rules of the Dublin II Regulation apply, meaning that this Member State has primary responsibility for asylum seekers intercepted in that maritime zone.[197] This reasoning seems to underpin The Netherlands' decision to limit the possible participation of one of its navy ships under CRATE to the territorial waters of the Member States in order to avoid having to take responsibility for people intercepted.[198] In theory, complications could nevertheless arise from the fact that onboard a ship, the flag state has jurisdiction even when in territorial waters.

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[193] See the case of the Cape Anamur: 'Italy holds migrants ship captain' (*BBC News*, 12 July 2004) and the case of seven Tunisian fishermen: Vassalo Paleologo, F., 'Ancora sotto accusa chi salva la vita in mare' (Melting Pot Europe, 18 August 2007): http://www.meltingpot.org/stampa10973.html

[194] According to the UNHCR "about 75 percent of those who arrived in Italy by sea applied for asylum, and around 50 per cent of them were granted refugee status or protection on other humanitarian grounds. Nearly all people who arrived irregularly by sea in Malta applied for asylum and some 60 percent were recognized as being in need of international protection.": 'Mediterranean Sea arrivals: UNHCR calls for access to protection' (Geneva, UNHCR Press Release, 9 January 2009).

[195] There is a growing body of literature on the question of the obligations under human rights and refugee law in the framework of border controls at sea, see: Fischer-Lescano, A. *et al.*, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law,' 21 *IJRL* 2 (2009), 256-296; Trevisanut, C., 'L'Europa e l'immigrazione clandestina via mare: FRONTEX e diritto internazionale', *Il diritto dell'Unione Europea*, 2 (2008), 367-388 and Trevisanut, C., 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' 12 *Max Planck YUNL* (2008), 205-246; Gammeltoft-Hansen, T., 'The Refugee, the Sovereign and the Sea: EU Interdiction Policies in the Mediterranean', in: Adler-Nissen, R. and Gammeltoft-Hansen, T. (Eds), *Sovereignty Games: Instrumentalising Sovereignty in Europe and Beyond* (Houndmills, Palgrave Macmillan, 2008), 171-196; Weinzierl, R., 'The Demands of Human and EU Fundamental Rights for the Protection of the European Union's External Borders', (Berlin, GIHR, July 2007).

[196] The UNCHR and IMO have together published a leaflet for shipmasters summarizing the legal framework: 'Rescue at Sea: A guide to principles and practice as applied to migrants and refugees', available at: http://www.unhcr.org/450037d34.html.

[197] Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003, L50/1.

[198] 'Nederland in gesprek over fregat voor Frontex' (*NRC Handelsblad*, 17 June 2009).

Most authors agree that the prohibition of *non-refoulement* also applies to the High Seas, thus prohibiting the diversion of ships back to unsafe third countries. As we noted in Chapter II, whenever a person is outside his/her country of origin the *non-refoulement* principle is deemed applicable.[199] In a Frontex joint operation the Member State of the flag would have to be considered responsible for an asylum claim lodged on board its ship, save agreement to the contrary with the other Member States.[200] The question remains to what extent a Member State is responsible for an asylum claim that is made from a boat alongside its vessel. Border guards have pointed out that in practice this does not occur, because of the chaotic situation at open sea. During Frontex joint operations boats intercepted on the High Seas have been escorted to EU territory after which people on board have been given the opportunity to lodge an asylum claim.[201]

Whilst it was argued that diversions on the High Seas could violate the principle of *non-refoulement*, diversions have become the rules rather than the exception within the contiguous zones and territorial waters of third countries. Even if most of these diversions take the form of SAR operations, the IMO Guidelines on the treatment of persons rescued at sea state that "[d]isembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedom would be threatened should be avoided."[202] A national of the coastal state will not be able to invoke the Geneva Convention in the territorial waters of this state, since the Convention requires the person to have left his/her country. However, many people aboard the ships intercepted by the joint patrols do not posses the nationality of the coastal State.[203]

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[199] Fischer-Lescano, A. et al., *supra* note 195, 267. See also Case 10.675, *The Haitian Centre for Human Rights et al. v. United States*, Report No 51/96, *Inter-AmCHR*, OEA/Ser.L./V/II.95 Doc. 7 rev. (1997), para. 157, discussed in Chapter II.

[200] Goodwin-Gill, G. and McAdam, J., *The Refugee in International Law* (Oxford, OUP), 246; Hathaway, J., *The Rights of Refugees under International Law* (Cambridge, CUP, 2005), 335 ff; Lauterpacht, E. and Bethlehem, D., 'The Scope and Content of the Principle of Non-Refoulement', in: Feller, E., Türk, V. and Nicholson, F. (Eds), *Refugee Protection in International Law* (Cambridge, CUP, 2003), 110-111. See also the UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007.

[201] The UNHCR's standpoint is that the identification and subsequent processing of asylum-seekers is most appropriately carried out on dry land: UNHCR Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Geneva, 1 March 2002). This is also excluded by Article 35(5), Council Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status, *OJ* 2005, L326/13

[202] IMO Guidelines, *supra* note 184, para. 6.17. Note that these guidelines apply irrespective of the jurisdictional maritime zone.

[203] See for instance the overview of nationalities in the public excerpts of the Frontex Evaluation Reports of joint operations Hera III, Nautilus and Poseidon in 2007, which list amongst others Ivory Coast, Afghanistan, Eritrea, Somalia and Iraq as important countries of origin (made available to the author).

The EU has time and again reaffirmed its commitment to the Geneva Convention, yet by operating in third country territorial waters it *de facto* emasculates the right to seek asylum.[204] It must be questioned whether all third countries with which the EU cooperates in these operations can effectively guarantee the rights provided for in the Geneva Convention. Therefore, whenever an asylum claim is made on board a Member State's vessel operating in the territorial waters of a third country, there should be a subsidiary responsibility for the flag-state in question. There is little or no information available about the fate of the people on board once they have been returned. The fact that this concern is not taken into account in the preparations of joint operations at sea may be partly blamed on the one-sided focus on border management in Frontex's mandate.

5.6 Questions of Liability for Wrongful Acts

In considering the responsibility for wrongful acts, such as a violation of the principle of *non-refoulement*, the illegal use of force or failure to come to the rescue, we should first of all recall the difficulty in holding Frontex responsible for its coordinating activities.[205] While the RABIT Regulation has regulated the civil and criminal liability of guest officers in joint operations and RABIT deployments, it should be realised that in general there will be no guest officers present on the vessels of other Member States. What will be discussed here therefore is the responsibility of the Member States acting in Frontex coordinated operations under provisions of international law.

Whereas the personal scope of the Geneva Convention and thus the obligation of *non-refoulement* is limited to people who have left their country of origin, other human rights instruments are not. Importantly, these may find application outside the territory of the Contracting Parties. Treaties such as the International Covenant of Civil and Political Rights (ICCPR), the Convention against torture and other cruel inhuman or degrading treatment or punishment (CAT) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) all contain provisions that are relevant in cases of

[204] See for instance the reference in recital 20, SBC, Recital 17 and Article 2, Regulation (EC) No 863/2007, establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ* 2007, L199/30 (hereinafter: "RABIT Regulation"). See in the relation to the right to leave one's country: Harvey, C. and Barnidge, R., 'Human Rights, Free Movement, and the Right to Leave in International Law', 19 *IJRL* 1 (2007), 12 ff, who assess it also in light of the Palermo Protocols, *supra* note 56.
[205] See Chapter IX.

refoulement.[206] Outside the context of refugee law these human rights instruments may also serve to protect other rights which could be violated in the course of a joint operation at sea. In the *Marine I* case, Spanish human rights organisations brought several complaints against Spain before the Committee against Torture regarding the reception and treatment of a number of irregular migrants who had been rescued in the Atlantic and had subsequently been returned to Mauritania. Although the case was declared inadmissible because the complainants could not be considered to have been duly authorised to represent the alleged victims under Article 22(1) CAT, the Committee did note that Spain exercised control over the irregular migrants from the time of their rescue and throughout their detention in Mauritania, triggering Spain's responsibility under the CAT for their treatment.[207]

Here, we shall focus on the case law of the ECHR in view of its special position in the Community legal order.[208] In *Banković* the ECtHR reaffirmed that the notion of jurisdiction in Article 1 of the ECHR, which determines the scope of application of the Convention, was to be understood "to reflect the ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case."[209] Nevertheless, as early as 1975 the European Commission of Human Rights in *Cyprus v. Turkey* established that a State's jurisdiction encompasses "all the persons under their actual authority and responsibility, whether that authority is exercised on its own territory or abroad."[210] In *Loizidou* the ECtHR added that the concept is not limited to the national territory of the Contracting States, holding that "a state may also be held accountable for violation of (…) rights and freedoms of persons who are in the territory of

[206] In particular Article 2 (right to life) and Article 3 (prohibition of torture) ECHR may be of relevance, although it has been argued that other provisions may also come into play: Den Heijer, M., 'Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights', *EJML* 10 (2008), 277-314. See for a comprehensive overview: Gammeltoft-Hansen, T., *Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control* (PhD thesis, Aarhus University, 2009), 116 ff.

[207] *J.H.A. v Spain* ("Marine I Case"), Committee against Torture, 21 November 2008, Communication No. 323/2007 (annotation by Wouters, K. and Den Heijer, M. forthcoming).

[208] The ECJ has held that respect for fundamental rights forms an integral part of the general principles of Community law, the observance of which is to be ensured by the Court: Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4. The Court has identified the constitutional traditions common to the Member States, as well as international human rights treaties which involved the Member States, as a source of these fundamental rights: Case 4/73, *Nold* [1974] ECR 491, para. 13. The Court has attributed specific significance to the ECHR: Case 36/75, *Rutili* [1975] ECR 1219, para. 32, and subsequent cases, such as Case C-36/02, *Omega* [2004] ECR I-9609, para. 33.

[209] *Banković and Others v. Belgium and Others* (Appl. No. 52207/99; adm. dec.), 12 December 2001, para. 61, see also *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (Appl. No. 71412/01 and 78166/01; adm. dec.), ECtHR, 2 May 2007, para. 69.

[210] *Cyprus v. Turkey* (Appl. Nos. 6780/74 and 6950/75), ECommHR 26 May 1975, 2 *DR* (1975), 136. Cf. *Lopez Burgos v Uruguay*, UN Human Rights Committee, 6 June 1979 (UN Doc. A/36/40, 176), para 12.3 and *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue') (Case 11.589*), Inter-American Commission on Human Rights. 29 September 1999, para. 24.

another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State".[211] In *Issa* it furthermore made clear that Article 1 could not "be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."[212]

In fact *Banković* did expressly acknowledge the possibility of extra-territorial jurisdiction, where a contracting state would exercise "the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."[213] It referred specifically to the activities of diplomatic and consular agents acting abroad and on board craft and vessels registered in, or flying the flag of, that State".[214] Where violations are the result of actions of the third country official on board, Member States should not be allowed to escape their responsibility. First of all, the official would be under the jurisdiction of the Member State of the flag. Secondly, where people are taken on board, these find themselves under the jurisdiction of the Member State of the flag, which would put a positive obligation on the Member State of the flag to protect the rights of these persons under the ECHR.[215]

In case of the sinking of a boat carrying migrants because of negligence or by accident, it is questionable whether the Member State could be considered to have been exercising jurisdiction.[216] If the sinking were to occur as the direct result of deliberate force directed at the boat or in the course of boarding the boat, one would have to assume it did. In *Xhavara and others*, the ECtHR was asked to consider the case of an Albanian boat that perished in the Canal of Otranto, after colliding with an Italian warship which had attempted to make it change its course. Although the ECtHR held that the case was inadmissible for the non exhaustion of local remedies, it clearly stated that the contracting parties were bound to

[211] *Loizidou v. Turkey* (Appl. No. 15318/89), ECtHR, 18 December 1996, para. 52. The criterion was also applied in *Öcalan*, which was declared admissible, because "the applicant was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest [by Kenyan officials] and return to Turkey: *Öcalan v. Turkey* (Appl. No. 46221/99), ECtHR, 12 March 2003, para. 93.
[212] *Issa and Others v. Turkey* (Appl. No. 31821/96), ECtHR, 16 November 2004, para. 71.
[213] *Banković supra* note 209, para. 71.
[214] *Ibid*, para. 73.
[215] For instance, in *Osman*, the ECtHR held as regards Article 2 (right to life), that a Contracting States is under the obligation "not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction: *Osman v. United Kingdom* (Appl. No. 23452/94), ECtHR, 28 October 1998, para. 115.
[216] Lawson, R., 'Life after Bankovic', in: Coomans, F. and Kamminga, M. (Eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004), 123.

protect the lives of those falling within their jurisdiction.[217] This implies that the victims were indeed considered as falling under Italian jurisdiction, notwithstanding the fact that the shipwreck took place in international waters.[218] One element to which the Court referred later in *Banković* was that "common jurisdiction was established by written agreement," which is comparable to the situation in which joint operations take place on the basis of bilateral agreements between Member States and third countries.[219]

The question of jurisdiction under Article 1 ECHR, should be distinguished from the question whether there may be state liability under public international law, invoked by one state against another on behalf of its nationals.[220] Article 2 of the of the Draft Articles on State Responsibility defines an internationally wrongful act as an action or omission which is a) attributable to a State under international law, b) constitutes a breach of an international obligation of the State. Article 4 provides that the conduct of any State organ shall be considered an act of that State. Consequently, Member States could be held responsible for the actions of their border guards during Frontex operations. Under Article 6: "[t]he conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."[221] One could therefore also argue that a third country coastal state, using the Member States as its agents to patrol its territorial waters, could be held responsible for the violation of the rights of nationals other than its own.[222] Alternatively, one could argue that the Member States act as agents for the Community, triggering the responsibility of the EC under the equivalent provisions in the Draft Articles on the responsibility of international organizations.[223] One may doubt however, in how far the principle of state responsibility would provide the individual with an effective remedy for a violation of his/her rights.[224]

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[217] *Xhavara and Others v. Italy and Albania* (Appl. No. 39473/98; adm. dec.), ECtHR, 11 January 2001.
[218] Tribunale di Brindisi, Penal Section, Ruling No. 338, 19 March 2005, 29.
[219] *Banković*, *supra* note 209, 81.
[220] O'Boyle, M., 'Comment on "Life after Bankovic"', in: Coomans, F. and Kamminga, M. (Eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004), 130. See also: Spijkerboer, T., 'The Human Cost of Border Control', 9 *EJML* 1(2007), 137.
[221] See also the Comment of the Dutch Permanente commissie van deskundigen in internationaal vreemdelingen-, vluchtelingen- en strafrecht on the Proposal for the RABIT Regulation to the Members of LIBE Committee of the European Parliament (Utrecht, 24 October 2006), which however does not seem to distinguish between the responsibility of guest officers during joint operations and State Liability.
[222] ILC Draft Articles on Responsibility of States for internationally wrongful acts, ICL Report of 53rd Session, A/56/10, 2001, Chap. IV.
[223] ILC Draft Articles on international responsibility of international organisations, ILC Report of 56th Session, A/59/10, 2004, Chap. V.
[224] Bradley, M., 'The Conditions of Just Return: State Responsibility and Restitution for Refugees' (Oxford, RCS Working Paper No 21, March 2005), 10.

5.7 The Search for a Common Interpretation of Rules

As follows from the above, the legal framework for extra-territorial patrols by Member States in the context of Frontex operations is characterized by the lack of a uniform interpretation of provisions of international law. As early as 2004, the JHA Council invited the Commission to "make an in-depth analysis of the existing international law instruments regarding illegal migration by sea which could identify the need for possible amendments to these international instruments to fill legal loopholes."[225] Specific attention was to be given to questions of SAR and international protection.

In May 2007, the Commission published a Study on the international law instruments in relation to illegal immigration by sea.[226] A number of fatal incidents in the summer of 2007 put considerable pressure on Frontex and the Commission to provide more clarity as regards the legal framework in which Frontex was to operate. Consequently, under considerable media attention, an "Expert Drafting Group on Practical Guidelines for Frontex Operations at Sea" convened in Brussels on 8 June 2007, involving not merely Member States representatives, but also representatives from the Commission, Frontex and international organisations such as IMO, UNHCR and IOM.

The group has met several times since, without however reaching agreement and eventually disintegrating into a Brussels talking shop. This may not come as too much of a surprise. The expert group's failure to come up with a set of mutually agreed guidelines, shows the limits of practical cooperation. First of all, Member States' representation was very diverse, ranging from envoys of the Permanent Representations to lawyers and officials of the ministries of the Interior, to practitioners from the various national border guard authorities. Secondly, the underlying questions at stake were anything but technical, but highly political. Rather than simply reaffirming its commitment to international obligations, the Community would actually have to decide how to interpret these obligations, something which was clearly beyond the scope of the expert group's powers. Finally, it was repeatedly pointed out by delegations that many of the questions on the table did not belong to the Community's powers

[225] Council conclusions evaluating the progress made with regard to the implementation of the Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union (Council Document 15087/04), 7.
[226] SEC(2007) 691 final, Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea.

and ought to be dealt with in the appropriate international forums, such as in the framework of the IMO.

The draft guidelines under discussion by the Expert Group have informed a Commission proposal for a draft implementing decision, currently under negotiation within the comitology committee.[227] Article 12(5) SBC provides for the adoption of additional rules governing border surveillance under comitology. This would mean that rather than non-binding guidelines, there would be binding rules. The text of the proposed decision is not publicly available. Border surveillance is however defined in Article 1(11) SBC as "the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks." Not only does this make it highly doubtful whether Article 12 SBC actually covers extra-territorial border surveillance, something on which there seems to be a lack of agreement also within the Committee, but also the relative openness of the expert group, including the involvement of international organisations with expertise in the field, has been lost. The adoption of the Decision, seems nevertheless unlikely leaving many of the questions and concern raised in this chapter unanswered.

In the meantime, Member States continue to play by their own interpretation of the rules. Joint patrols of Libya and the Italy under the Treaty on Friendship, Partnership and Cooperation started on 15 May 2009. Earlier that month Italy declared that it had for the first time managed to directly return people to Libya, something it presented as a major success in its fight against irregular migration by sea and as an example for a European policy.[228]

From the little information available in the press it appears that two boats were sighted adrift about 50 miles off the coast of the Italian island of Lampedusa.[229] Italy refused to intervene, claiming that it was Malta's responsibility, since the boats found themselves in international waters in the Maltese SRR. Italy was however undoubtedly the nearest place of safety and the Member State most suited to come to the rescue. Only after Libya had agreed to take the people back onto its territory, were they taken on board an Italian patrol boat and subsequently returned.

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[227] Draft Commission decision establishing rules on the surveillance of the sea borders pursuant to Regulation (EC) No 562/2006 of the European Parliament and of the Council, not publicly available (Comitology Register, Dossier CMTD(2009)0143).

[228] Italian Ministry of the Interior, 'Maroni: "Il respingimento dei barconi rappresenta una svolta nel contrasto all'immigrazione clandestina"' (Press Release, 7 May 2009).

[229] 'Migrants "might be taken back to Libya" – Maroni' (*Times of Malta*, 6 May 2009); 'Libya accepts boat people back from Italy' (*AFP*, 7 May 2009); 'Italy Returns 227 Migrants to Libya' (*New York Times*, 8 May 2009).

Although in theory this operation could be cast in terms of a SAR operation, the Italian government did not even attempt to do so.[230] It showed very little concern for the question of *non-refoulement* or the fate of the people returned in general.[231] Both Frontex and the Commission have declined to comment on the situation. Italy in the meantime continues its practice of diversions despite fierce criticism by the UNHCR and other human rights organisations.[232]

6. Conclusion

This chapter has shown that the external dimension of the management of the external borders has continuously gained importance as part of the EU's overall policy in this field. Action in the external domain is mostly motivated by internal security concerns, and in this respect the external dimension of this policy field, and in fact the broader AFSJ, mirrors the internal development of thereof. There is first of all a strong emphasis on security in the form of control measures and only limited attention to questions of freedom and justice. Secondly, the external dimension is characterised by the focus on "on the ground" operational cooperation.

The external dimension of the Community policy for the management of its external borders takes shape in a number of different ways. A distinction can be made between the power to conclude international agreements for the purpose of the management of the external borders themselves and the promotion of the EU's border *acquis* in third countries. Even if the purpose of the latter is often the externalisation of the Community's border controls to third countries, the substantive legal bases for external border management in the Treaty cannot as such serve as implied external powers and these must therefore be found in other areas of Community competence.

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[230] Note that Italy has a history of returning large groups of irregular immigrants to Libya. It has done so on the basis of article 10 of the Italian immigration law ("respingimenti", i.e. rejection at the border), rather than under Article 13 (administrative expulsion), Decreto Legislativo 286/1998, *GU* No 191, 18 August 1998. See Human Rights Watch, 'Libya: Stemming the Flow. Abuses Against Migrants, Asylum Seekers and Refugees', 18 *Human Rights Watch Report* 5 (2006), 106 ff and Pastore, F., 'Libya's entry into the migration great game: recent developments and critical issues', October 2007, forthcoming in: Guiraudon, V., *The International Politics of Immigration in Europe* (Cheltenham, Edward Elgar).

[231] Libya is not a party to the Geneva Convention. Provisions on the Geneva Convention do exist in the Libyan Constitution and Convention of the Organisation of African Unity, which has been ratified by Libya. See on the inhumane treatment of irregular migrants and asylum seekers in Libya: Human Rights Watch, *ibid*., 30 ff. See also the reply of Italian Minister of the Interior Roberto Maroni to questions asked in the Italian House of Representatives on 14 May 2009 on the fate of the diverted migrants: http://www.interno.it/mininterno/export/sites/default/it/assets/files/16/0448_Pezzotta_3-00521.pdf.

[232] UNHCR Press Release of 7 May 2009: 'UNHCR deeply concerned over returns from Italy to Libya'; 'Lite Onu-Maroni sui respingimenti. Sono illegali. Noi andiamo avanti' (*La Repubblica*, 16 May 2009).

The existence of a special protocol on the external borders and the inconclusiveness of practice seems somehow to set this area apart from the EU's general external relations law. Although in terms of substantive law-making the Community is increasingly occupying this field of Community competence, circumscribing the leeway of the Member States, it is unlikely that the Member States will be fully deprived of their powers in the external sphere of border management, in particular in relation to bilateral operational cooperation. On many occasions the Member States will continue to be in a better position to negotiate agreements with third countries, rather than the Community itself.

The exportation of the Community's border *acquis* may take place under a number of different external Community policies, in particular the Community's enlargement policy, the ENP and development policy. It is financially made possible through the Community's instruments for external funding. Since the restructuring of these instrument, the limitations that result from the distinction between the pillars of the European Union as came to the fore in the *Philippines Border Management* case, have largely been overcome. They have, amongst others, been used for the financing of EU border management missions in third countries, such as the BOMCA and the EUBAM. Both of these touch not only upon questions of migration, but also of crime control and the Community's CFSP.

Border missions in third countries are the first example of the operational character of the external dimension of the EU's border management, even if admittedly the members of these missions do not have actual operational powers themselves. The second example is formed by operational activities at the external borders involving the border guard authorities of neighbouring third countries. Here Member States' authorities, but also Frontex, have increasingly been involved in the conclusion of non-binding operational agreements, which allow for intensified operational cooperation with third countries' border guards authorities.

The prominence of the operational dimension is also present in the extra-territorial border surveillance on the High Seas and in third country territorial waters. It is clear however, that many of the advantages the Member States wish to gain from this extra-territorial control are offset against the uncertainty of the legal framework under which they operate. The failed attempts to provide for more clarity in relation to the legal framework for Frontex operations at sea evidence the limits to operational cooperation and the need for substantive harmonisation and a common approach in this area. It may well be argued that a solution can only be found in the establishment of a truly European burden-sharing system,

under which the responsibility for asylum claim and return is divided between the Member States.[233]

It should be clear that Member States cannot escape their responsibility to process asylum claims and will be fully responsible for possible wrongdoings vis-à-vis irregular migrants. Unfortunately, the lack of transparency and the "executive" character of cooperation with third countries means that it is increasingly difficult to assess what is actually happening at the external borders of the EU. Even if legally there may be certain safeguards available, in practice it is very difficult to assess whether these are actually being respected.

This brings us to a set of final consideration which are no longer of an exclusively legal nature. The Community should in the development of the external dimension of external borders management be more aware of the practical implications of its policies. Increased cooperation with some third countries has already led to the diversion of migratory routes, the "waterbed effect", often resulting in longer and more perilous journeys. Moreover, by effectively preventing people from leaving certain third countries, the EU is emasculating the right to look for asylum, either because asylum seekers cannot leave their country or because they are forced to stay in a third country that cannot adequately process their request or may *refoule* them. If the EU is really committed to respect for fundamental human rights and its international obligations, it should reconsider on these very practical grounds its cooperation with third countries with a questionable human rights record. It should moreover give thought to how it can ensure respect for the safeguards contained in the SBC in the context of extra-territorial controls, ensuring that the rule of law is also respected in the external dimension of EU border management.

[233] A very careful first step in that direction can be discerned in the European Council Conclusions of 18-19 June 2009 which call for "the coordination of voluntary measures for internal reallocation of beneficiaries of international protection present in the Member States exposed to specific and disproportionate pressures and highly vulnerable persons," point 37.

XI. Conclusion

This concluding chapter will, rather than summarise the conclusions that can be found at the end of each individual chapter, highlight some of the problems that were identified in this thesis as regards the EU's regulatory framework on the management of the external borders.

Since the incorporation of the Schengen *acquis* into the European legal order by the Treaty of Amsterdam, a true regulatory framework for the management of the external borders has been put in place. To a large extent this policy area can now be regarded as any other area of Community competence. Not only have competences been fully communitarised, the implementation of legislation now also follows the standard Community practice of implementation by the Commission under the supervision of comitology. The area in which the Community rules on the free movement of persons apply is increasingly congruent with the Schengen area, since all acceding Member States are under an obligation to accept the Schengen *acquis* in full and the EEA countries and Switzerland have associated themselves with the Schengen cooperation. The intergovernmental origins of the Schengen cooperation remain clearly visible only in as far as the Schengen evaluation on the implementation of the Schengen borders *acquis* continues to fall under the responsibility of the Council rather than the Commission.

The EU's policy on the external borders does however have a number of structural flaws which jeopardise not only its efficiency, but also its legitimacy. First, a true borderless area in which there is the free movement of people, comparable to a Member States national territory, or even the internal market for goods, does not exist. The Schengen Borders Code (SBC) does not contain a right of entry into the Schengen territory once a third country national (TCN) fulfils all entry conditions.[1] Only those persons with a right of free movement under Community law can claim a right of entry into another Member State, unless of course one of the narrowly defined exceptions applies. The case law that preceded the *Metock* judgement demonstrates the reluctance of Member States to accept limitations on their sovereign power to decide who to allow to enter their respective territories.[2] *Metock* not only confirmed that EU citizens may invoke the right to cross any Member State's border when coming from outside the EU, but also held that TCN family members of the EU citizen do not already have

[1] Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* 2006, L105/1.
[2] Case C-127/08, *Metock* [2008] ECR I-0000, *nyr*.

to be legally present on the territory of the EU Member State. The only remaining question is whether this right may be invoked at any of the Community borders or only at the border of the Member State in which the EU citizen exercises his/her right of free movement.

The fundamental distinction between EU citizens and TCNs not only shapes the Community's rules on free movement, but also the way in which people are treated at the external borders of the Schengen area. Here an additional distinction needs to be made between TCNs that are exempted from a visa obligation and those that are not. Although the Commission's proposal to introduce a registered traveller status independent of citizenship would somewhat mitigate the consequences of the distinction between TCNs and EU citizens, it would neither change, nor do away with, any visa requirements. The right of TCNs to move freely within the Schengen area is limited to three months. The Lisbon Treaty confirms explicitly that it is the Member States alone who decide on the number of persons they allow to enter their territory for periods exceeding three months. It is also within the exclusive competence of the Member States to decide on requests for asylum. One could argue that despite the abolition of border controls, the Member States still very much think in terms of nationally defined territories. An example can be found in the Italian "expulsion decree" and the existence of the Schengen visa with limited territorial validity.[3] Also the nature of the (limited) free movement rights granted to certain categories of TCNs under Title IV EC must be noticed. The recently adopted "Blue Card Directive" provides for a right of (re)entry and stay only in the issuing Member States, with a right of passage through other Member States.[4]

The second problem relates to the principle that the individual Member States remain ultimately responsible for their internal security and therefore also for the management of their respective part of the external borders. The SBC only contains general rules in terms of the requirements for border guards, the intensity and *modus operandi* of border controls, as well as the organisation of border guard authorities.

A harmonisation of these issues is not indispensable for a correct and uniform application of the SBC. In fact this could largely be achieved through the exchange of best practices, joint training and exercise, areas in which Frontex has competence, but on which it should perhaps increase its focus. The Commission at the same time should take a much firmer stand, insisting not only on the correct application of the rules contained in the SBC,

[3] Decreto-Legge, No 181, 1 November 2007, Disposizioni urgenti in materia di allontanamento dal territorio nazionale per esigenze di pubblica sicurezza, *GU* No 255, 1 November 2007.
[4] Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ* 2009, L155/17.

but in particular on the respect for fundamental human rights and international refugee law in doing so. Although the Court is not explicitly precluded from judging on the validity or proportionality of the activity of border guards, an argument against this could be found in Articles 68(2) EC and 35(5) EU. It was nevertheless argued that the ECJ should assume jurisdiction by analogy of its case law on Member States' national rules that come within the scope of Community law and check the conformity of Member States' operational activity with fundamental rights.

So far Frontex has remained a rather weak actor, which has on various occasions become the victim of blame-shifting by the Member States and the Community for their own failings in migration and asylum policy. The agency has no executive powers and its role is limited to the coordination of joint operational activity. During joint operations all assets remain under national command, and Frontex is dependent on the Member States' respect for the operational plan drawn up in advance of the operation, the legal status of which however remains unclear. Although most of Frontex's human and financial resources have been directed at the coordination of joint operational cooperation the success of these operations is difficult to measure.

Evidently much can be said for rationalising and coordinating patrols in adjourning border areas. Yet, under current practice, Frontex's joint operations seem to have had little added value other than a symbolic one, in addition perhaps to the financial benefit for participating Member States in the form of co-funding. If the aim of joint operational activity is to achieve a level of solidarity between the Member States in managing the external borders, this could be better achieved through a financial redistribution mechanism such as the External Borders Fund (EBF), support in building up reception facilities, as well as a resettlement programme for asylum seekers.[5] It has been argued that the tasks given to Frontex under the EBF fits its role much better as a regulatory agency.

A third issue concerns the operational character of the management of the external borders and the exercise of public authority. The operational character of this policy field sets it apart from other areas of Community competence, while it forms, at the same time, the feature that it has in common with other competences under the Third Pillar.

Because of its operational character, the management of the external borders is consistently portrayed as a non-political and technical exercise. The experience with Frontex,

[5] Decision No 574/2007/EC establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows', *OJ* 2007, L144/22.

however, shows that it is anything but. Although established in part as an independent agency exactly so that it can be insulated from conflicting national interests, the Agency has found itself under strong political pressure from the Community institutions, as well as from the Member States. Although it could insist more heavily on its independence, the dilemma is that under the Court's *Meroni* doctrine it would not be allowed to engage in political decision-making.[6] Yet in its assessment of whether, where, when and how to deploy its limited resources, it inevitably has to make policy choices.

Furthering European integration and achieving a level of harmonisation through practical cooperation is also problematic. If harmonisation is desirable at all, it requires important political choices to be made and hence democratic legitimacy which would require the adoption of legislation. The current cooperation between border guard authorities within the framework of Frontex originated from practical intergovernmental working arrangements which were only at a later stage given a legal basis in secondary legislation. Likewise, the development of EUROSUR is already under way, before any legislative proposal has been made. Even where legislation has been adopted, the very nature of border management is operational and does not of itself involve decision making aimed at creating rights and obligations on third parties, which makes the judicial review of operational activity difficult.

A fourth issue that arises concerns the quality of law and policy making, which seems subordinated to the (political) wish to show decisive action in the fight against irregular migration. While Member States are generally very cautious to adopt legislation in areas touching upon the core understanding of sovereignty, in the fight against irregular migration they have adopted legislation that is both far-reaching and of limited practical value at the same time.

The prime example here is the RABIT Regulation, which may be considered a small, but important step in the direction of a Common Corps of Border Guards.[7] It establishes a system which essentially equates visiting border guards with those of the home Member States *on the basis of Community law*. The fact that this also entails the right to carry weapons and the potential use of force has, however, largely been ignored as a result of the more controversial amendment introduced by this Regulation, which established a mechanism for the deployment of Rapid Border Intervention Teams (RABITs). Although the creation of the

[6] Case 9/56, *Meroni* [1957] ECR 11 at 147-149 and Case 10/56, *Meroni* [1958] ECR 53 at 169-171.
[7] Regulation (EC) No 863/2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ* 2007, L199/30.

RABIT mechanism was predominantly motivated by the irregular migration in the Atlantic and the Mediterranean, it has proven impracticable for joint operations at sea, and is yet to be put in practice on land.

A second example is the insistence on the development of databases and systems for information exchange such as the SIS II, the VIS, but also the proposed entry-exit system. Not only has the development of such systems been plagued by technical problems, they have also been adopted without a thorough assessment of their feasibility, of the benefits that are likely to be achieved and of their impact on the citizens' right to privacy.

A final concern relates to the extra-territorialisation of border controls. The wish to take action against the flow of irregular migration across the Mediterranean and Atlantic has resulted in joint operations coordinated by Frontex taking place on the High Seas or in the territorial waters of third countries. Not only have these operations been very costly, they have taken place on shaky legal ground, removed from the public eye and, most worrying, with a lack of attention for questions of international protection.

The failure of practitioners to come up with guidelines for these operations shows once more that the management of the external borders does not take place in a legal vacuum. In the case of extra-territorial border controls at sea, a common interpretation of the Law of the Sea, the Search and Rescue Regime and the Geneva Convention is necessary, which requires action from the Union's political actors. In the meantime, the failure of the European Union to do so has resulted in Member States playing the game by their own rules. Italy has, for example, started to divert boats carrying irregular migrants to their port of departure under a bilateral agreement with Libya. This blatant violation of international obligations shows not merely the legal, but also moral weakness of the EU's immigration and asylum policy.

Despite the existence of uniform rules governing the crossing of individuals of the Schengen external borders, most importantly in the form of the SBC and the Local Border Traffic Regulation, the broader management of the external borders takes place in a much more complex legal framework.[8] Border management should be a part of or rather a complement to a Common European Asylum and Migration policy, but currently constitutes at most an incomplete substitute. While the expectations of the EU are high, as are its aspirations, the

[8] Regulation (EC) No 1931/2006 laying down rules on local border traffic at the external land borders of the Member States, *OJ* 2006, L405/1.

reality shows that the success of operational cooperation essentially depends on the Member States' commitment to it.

The Commission has not abandoned its vision of a European Corps of Border Guards, although it is careful to say so aloud. It is now up to the Community legislator to make the choice either to continue following the inevitably long and winding road towards future integration and the eventual establishment of such Corps or to leave border management exclusively to the individual Member States, possibly under a stricter supervision of the Commission and with additional solidarity mechanisms put in place other than those based on operational cooperation. The Lisbon Treaty seems to provide for the necessary legal basis for the first option. Member States should, however, realise that the conferral of executive powers on the European Union has important consequences for the nature of European integration and for their position as sovereign states within that Union. It remains to be seen whether the desire to kerb irregular migration could placate Member States' sovereignty concerns.

The main text of this thesis was finished in June 2009, the same month in which the Commission presented its Communication in preparation of a new multiannual programme in the Area of Freedom, Security and Justice (AFSJ), the follow-up to the Hague Programme.[9] This agenda, already referred to as the Stockholm Programme, is to be adopted in the Autumn of 2009 under the Swedish Presidency. As was shown in this thesis, border management cannot be seen in isolation from the other policies in EU Justice and Home Affairs (JHA) cooperation. Therefore a brief look at the way in which the Commission envisages the future development of the AFSJ is in order.

In respect of the management of the external borders, the Commission's Communication of June 2009 in preparation of the Stockholm Programme largely recalls the proposal set out in its 2008 Border Package.[10] It states that an entry-exit system and a registered traveller programme must be established. Only in relation to the system of prior travel authorisation it argues that its usefulness would still have to examined. EUROSUR should be up and running by 2013.[11]

[9] COM (2009) 262 final, Commission Communication, 'An area of freedom, security and justice serving the citizen'.
[10] COM(2008) 67 final, Commission Communication, 'Report on the evaluation and future development of the FRONTEX Agency'; COM(2008) 68 final, Commission Communication examining the creation of a European Border Surveillance System (EUROSUR); COM(2008) 69 final, Commission Communication, 'Preparing the next steps in border management in the European Union.'
[11] COM (2009) 262 final, *supra* note 9, 31.

The Commission recognises the need for improvement in the operational cooperation between Member States and argues that Frontex's operational capacities should be expanded. Its priorities are the "powers of command over joint operations *on a voluntary basis*, use of its own resources, and ability to mobilise more easily the manpower needed to carry out operations."[12] It is especially the suggestion that Frontex should be put in command of joint operations, even if on a voluntary basis, that seems to go further than anything suggested so far and would fuel concerns voiced as regards the accountability and responsibility of the Community during joint operational activities.

A further diversification in the way in which checks are carried out at the external borders is implied in the Commission's notion of separating private and commercial traffic. "One-stop-shop" checks at the external borders should further the objective of a system of integrated border management.[13] The security function attributed to the border comes to the fore in the assertion that a strategy for the internal security of the Union should centre around three interconnected fields of action: "stronger police cooperation, a suitably adapted criminal justice system and more effective management of access to EU territory."[14] An integrated border management should allow for "smooth entry into the Union, while guaranteeing the security of its territory and the fight against illegal immigration."[15] It is interesting that any reference to a role for Frontex in relation to cross-border crime is absent from the Communication.

The Communication in its explicit reference to "serving the citizen" confirms that the Area of Freedom, Security and Justice essentially serves the interest of the Union and it citizens. Migration issues are to remain an integral part of the external policy, with the habitual reference to the need to control illegal migration and promote cooperation on surveillance and border controls. At the same time, the aspirations of the "Global Approach to migration" are visible in the reference to the promotion of mobility and legal migration.

In this thesis, the focus of EU law and policy making in the AFSJ on the external borders was in part explained by the lack of substantial progress in areas of asylum, migration and criminal law. It must therefore be regarded as positive that in all three areas the Commission intends to take action.

In the field of asylum law its goal is to create a common area offering protection and solidarity through a single asylum procedure and a uniform international protection status.

[12] *Ibid*., 18.
[13] *Ibid*., 31.
[14] *Ibid*., 16.
[15] *Ibid*., 31.

The question is to whom this solidarity refers. In terms of a genuine burden-sharing of responsibility, the Communication only repeats the very cautious call for a "mechanism for internal resettlement" that is voluntary and coordinated and it remains therefore doubtful whether this mechanism will be very effective if agreement is ever reached on it.[16]

In the area of migration law the Commission proposes the adoption of a an "Immigration Code", granting legal migrants a uniform level of rights comparable to those of the EU citizen. Although, as was noted above, individual Member States will retain the power to determine the numbers of TCNs they admit for stays exceeding three months, a uniform set of rights should establish a genuine area of free movement for legal immigrants, which should include the right to cross the external borders of the European Union under conditions similar to those of EU citizens.

In relation to criminal law, the Commission notes that progress has been slow. It rightly acknowledges the need for an alignment of national rules in relation to specific serious, cross-border crimes. The lesson to be learnt from cooperation under the coordination of Frontex is, however, that a substantive body of legislation may not be enough to ensure effective cooperation between Member States enforcement authorities. Attention should therefore also be paid to the institutional aspects of this cooperation, as well as to the exercise of executive powers in the course of joint operational activity. Unlike Frontex, however, agencies like Europol and Eurojust will find a specific legal basis in the EU Treaty if the Lisbon Treaty enters into force. However, as we have seen the Lisbon Treaty does fail to provide an overall constitutional framework for the exercise of executive powers. It will be necessary to monitor the development of the Standing Committee on Internal Security (COSI) closely, in order to see how the exercise of these powers in the AFSJ will develop after the eventual entry into force of the Lisbon Treaty.

The management of the borders, the enforcement of asylum and migration law and the cooperation in criminal matters all touch upon the fundamental rights of individuals. The Commission seems to balance the unchecked growth of databases containing personal data, with the establishment of a comprehensive personal data protection scheme covering all areas. Although legislation protecting the individual is indispensable, a broader discussion on the necessity for and proportionality of the collection of personal data is much needed.

In the management of the external borders, migration and asylum, the rights of TCNs are at stake, rather than those of the EU citizen. The TCNs that are affected by these policies

[16] *Ibid*., 27.

generally find themselves in a particularly vulnerable position. Despite the almost obligatory assertion in EC legislation that any legislation fully respects fundamental rights, the Communication lacks specification on how these rights are to be protected. Current Member State practice at the external borders shows that in the absence of a common interpretation and a genuine commitment to ensuring these rights, affirmations that "[m]aintaining a high level of internal security must go hand in hand with the absolute respect for human rights and international protection" remain mere lip-service to the EU's fundamental values.

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